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No. 96-

# In the Supreme Court of the United States

OCTOBER TERM, 1996

UNION OIL COMPANY OF CALIFORNIA,
*Petitioner*

*v.*

CITIZENS FOR A BETTER ENVIRONMENT
CALIFORNIA, ET AL.,
*Respondents*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Clean Water Act authorizes citizen suits in federal court for violations of NPDES permit limitations. 33 U.S.C. §1365(a)(1). Citizen suits are barred, however, when they allege violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or * * * the State has issued a final order * * * and the violator has paid a penalty assessed under * * * such comparable State law." 33 U.S.C. §1319(g)(6)(A)(ii) and (iii).

In this case, the State of California, acting through its Regional Water Quality Control Board, initiated enforcement proceedings against oil refiners, including Unocal, who were unable, due to the absence of environmentally acceptable control technology, to meet the permit limit of 50 ppb for selenium. Following negotiations, petitioner Unocal and two other refiners reached a settlement with the Regional Board under which they paid the State $2 million and, pursuant to a cease and desist order, undertook extensive and costly development of selenium control technologies. In exchange, the Board agreed to defer for four and a half years the date for compliance with the 50 ppb selenium limit. The following question is presented:

> Whether the Clean Water Act bars a citizen suit alleging violations that were resolved by a State administrative order and settlement payment under a State statutory scheme comparable to the Clean Water Act, as the First and Eighth Circuits have held, or whether the bar arises only if the State agency proceeded under the specific penalty provision that corresponds to section 309(g) of the Act, as the Ninth Circuit held in this case.

## LIST OF PARTIES

1. UNOCAL CORPORATION is the parent company of Union Oil Company of California.

2. UNION EXPLORATION PARTNERS, LTD. is a partnership involving Union Oil Company of California.

3. 76 PRODUCTS COMPANY is a wholly-owned subsidiary of Union Oil Company of California.

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY PROVISION INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE PETITION | 7 |
| A. The Ninth Circuit's Decision Impermissibly Allows Citizen Suits To Intrude Upon State Enforcement Discretion Under The Clean Water Act, Contrary To This Court's Decision In *Gwaltney* | 10 |
| B. The Decision Below Violates The Section 309(g) Bar On Citizen Suits, Offends The Strong Public Policy Favoring Settlements, And Conflicts With Decisions Of The First And Eighth Circuits. | 14 |
| 1. The Ninth Circuit's interpretation of the "comparable State law" provision conflicts with decisions of the First and Eighth Circuits | 15 |
| 2. The Ninth Circuit's "comparability" rationale is contrary to the plain language of the Act and is contrary to the intent of the Act | 17 |
| 3. The Ninth Circuit decision misconstrues the "penalty assessed" provision of the statute by excluding payments made to settle state enforcement actions | 19 |
| 4. The Ninth Circuit's decision violates strong public policy favoring settlements | 23 |
| C. The Issue Presented Is A Recurring One Of National Significance | 25 |
| CONCLUSION | 27 |

## TABLE OF CONTENTS — Continued


Page

APPENDIX

A. Opinion of the Court of Appeals . . . . . 1a-17a

B. Opinion of the District Court . . . . . 18a-65a

C. Order of the Court of Appeals denying Unocal's petition for rehearing en banc . . . . . 66a

D. Order staying mandate . . . . . 68a

E. Final Cease and Desist Order of the Regional Board . . . . . 69a-81a

F. Stipulation for Settlement and Dismissal of Action in State Court . . . . . 82a-88a

## TABLE OF AUTHORITIES

**CASES** **Page**

*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011 (1974) . . . . . 24

*Arkansas Wildlife Federation* v. *ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, U.S. __, 115 S.Ct. 1094 (1995) . . . . . *passim*

*Atlantic States Legal Foundation Inc.* v. *Universal Tool & Stamping Co.*, 735 F.Supp. 1404 (N.D. Ind. 1990) . . . . . 8

*Boise Cascade Corp.* v. *U.S.E.P.A.*, 942 F.2d 1427 (9th Cir. 1991) . . . . . 19

*California Sportfishing* v. *City of W. Sacramento*, 905 F.Supp. 792 (E.D. Cal. 1995) . . . . . 8

*City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958) . . . . . 21

*Connecticut Coastal Fishermen's Ass'n* v. *Remington Arms Co.*, 777 F.Supp. 173 (D. Conn. 1991); *aff'd in part rev'd in part* 989 F.2d 1305 (2nd Cir. 1991) . . . . . 8

*Gwaltney of Smithfield* v. *Chesapeake Bay Found.*, 484 U.S. 49 (1987) . . . . . *passim*

*Knee Deep Cattle Co., Inc.* v. *Bindana Inv. Co. Ltd.*, 94 F.3d 514 (9th Cir. 1996) . . . . . 8, 26

*Knee Deep Cattle Co.* v. *Bindana Investments Co.*, 904 F.Supp. 1177 (D. Or. 1995) . . . . . 26

*Mack* v. *South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986) . . . . . 2

## TABLE OF AUTHORITIES — Continued

**Pages**

*Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 101 S.Ct. 2615 (1981) . . . . . 12

*Molokai Chamber of Commerce* v. *Kukui, Inc.*, 891 F.Supp. 1389 (D. Hawaii 1995) . . . . . 8

*Natural Resources Defense Counsel* v. *Vygen Corp.*, 803 F.Supp. 97 (N.D. Ohio 1992) . . . . . 8

*North and South Rivers Watershed Assoc.* v. *Scituate*, 949 F.2d 552 (1st Cir. 1991) . . . . . *passim*

*Russello* v. *United States*, 464 U.S. 16, 104 S. Ct. 296 (1983) . . . . . 18

*Saboe* v. *Oregon*, 819 F.Supp. 914 (D. Ore. 1993) . . . . . 24

*Sierra Club* v. *Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987) . . . . . 11

*Sierra Club* v. *Colorado Refining Co.*, 838 F.Supp. 1428 (D. Col. 1993) . . . . . 8

*Supporters to Oppose Pollution, Inc.* v. *The Heritage Group*, 973 F.2d 1320 (7th Cir. 1992) . . . . . 16

*United States* v. *Cannons Engineering Corp.*, 899 F.2d 79 (1st Cir. 1990) . . . . . 25

*Washington Public Interest Research Group* v. *Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993) . . . . . 8, 16

*Williams* v. *First National Bank*, 216 U.S. 582, 30 S.Ct. 441 (1910) . . . . . 24

## TABLE OF AUTHORITIES — Continued


Pages

**FEDERAL STATUTES**

28 U.S.C.

§1254(1) . . . . . 1
§1292(b) . . . . . 1, 6

33 U.S.C.

§1251(b) . . . . . 19
§1314(l) . . . . . 3
§1319(d) . . . . . 11
§1319(g) . . . . . 11
§1319(g)(2)(B) . . . . . 18, 23
§1319(g)(3) . . . . . 23
§1319(g)(6) . . . . . *passim*
§1342 . . . . . 25
§1365(a)(1) . . . . . 5, 11
§1365(b)(1)(B) . . . . . 11

40 C.F.R.

§123.27(c) . . . . . 18
§123.27(d)(2)(iii) . . . . . 18, 20
§131.36(d)(10) . . . . . 3

**STATE STATUTES**

Cal. Water Code

§13301 . . . . . 7, 15, 18, 22
§13302 . . . . . 18
§13308 . . . . . 7
§13320 . . . . . 5, 13
§13323-13328 . . . . . 7
§13330 . . . . . 5, 13
§13350 . . . . . 7
§13385 . . . . . 7, 15, 21, 23

## TABLE OF AUTHORITIES — Continued

**Pages**

§13385(a) . . . . . 11
§13385(e) . . . . . 23
§13385(i) . . . . . 22

**OTHER SOURCES**

Sen. Rep. No. 92-414, 92d Cong. 1st Sess. 64 (1971) . 19

137 Cong.Rec. S5902 (May 15, 1991) . . . . . 2

BNA, *Environmental Citizen Suits: Confronting The Corporation* (1988) . . . . . 8

Fed.R.Civ.P. 12(b)(1) . . . . . 6

Fed.R.Civ.P. 12(b)(6) . . . . . 6

Legislative History of Water Quality Act of 1987 ("*Leg. Hist*").

1 *Leg. Hist.* 367 (1987) . . . . . 17

2 *Leg. Hist.* 828 (1987) . . . . . 18, 20, 22

2 *Leg. Hist.* 1103 (1987) . . . . . 17

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Union Oil Company of California ("Unocal") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 83 F.3d 1111 (1996). The opinion of the district court (App., *infra*, 18a-65a) is reported at 861 F.Supp. 889 (N.D. Cal. 1994).

## JURISDICTION

The order of the district court denying petitioner's motion to dismiss was certified and accepted for interlocutory appeal pursuant to 28 U.S.C. §1292(b). The decision of the court of appeals, as amended, was rendered on July 16, 1996. App., *infra*, 1a. A timely petition for rehearing was denied on August 15, 1996. *Id.* at 66a-67a. The petition for writ of certiorari is due November 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISION INVOLVED

Section 309(g)(6)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(6)(A) provides, in relevant part:

> * * * any violation -
>
> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
>
> (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

## STATEMENT OF THE CASE[1]

1. *Like more than 75,000 other companies and municipalities nationwide, Unocal discharges wastewater under an NPDES permit*: Unocal owns and operates a petroleum refinery near Rodeo, California. (ER 4) Treated wastewater discharged from the refinery is subject to the requirements of Unocal's National Pollutant Discharge Elimination System ("NPDES") permit, issued and enforced by the California Regional Water Quality Control Board ("Regional Board") pursuant to the provisions of the Clean Water Act. (ER 9) There are more than 75,000 active NPDES permits nationwide (http://www.epa.gov:80), held by businesses, municipalities and other entities. *See also* 137 Cong.Rec. S5902, S5928 (May 15, 1991).

Discharge of wastewater containing selenium, an element naturally occurring in crude oil, is regulated by Regional Board orders issued under the NPDES permit. (ER 9-10) On June 19, 1991, the Regional Board amended the NPDES permits for six Bay Area refiners, including Unocal. The Board set a "final" selenium mass emission rate of .85 pounds per day and a concentration limit of 50 parts per billion ("ppb") for Unocal's wastewater discharge, to be effective December 12, 1993. (ER 375) In the meantime, the Board required Unocal to comply with an interim limit of 5.6 pounds per day. (ER 376)

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[1] The facts summarized below are not in dispute and are based on the complaint as well as documents offered by the parties from State agency proceedings that were judicially noticed by the district court. (Excerpts of Record ("ER") 40, 98, 251, 297, 364 n.2) On a Rule 12 motion to dismiss, the courts may judicially notice agency records. *Mack* v. *South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

2. *Unocal and other refiners sue the Regional Board in state court to set aside the selenium discharge limits*: On September 16, 1992, the State Water Resources Control Board ("State Board") denied the refiners' administrative appeal of the Regional Board order adopting the interim and final selenium limits. (ER 242 ¶13) On October 16, 1992, the Western States Petroleum Association ("WSPA") and all six refiners petitioned in California state court for a writ of mandate to set aside the selenium limits. (ER 235) The petition contended that, with respect to selenium, Section 304(l) of the Clean Water Act (33 U.S.C. §1314(l)), does not apply to San Francisco Bay or the six refineries because the concentrations of selenium in the Bay do not exceed the "applicable [water quality] standard" for selenium. (ER 239-245; *see* ER 64 ¶6-7, 368 ¶10) The applicable United States Environmental Protection Agency ("EPA") water quality standard for selenium is 71 ppb in salt water, and 5 ppb in fresh water. 40 C.F.R. §131.36(d)(10). (ER 63 ¶3) Ambient concentrations of selenium in San Francisco Bay waters are consistently below 0.3 ppb, less than one tenth of even the more stringent fresh water standard. (ER 244 ¶16)

3. *The Regional Board initiates an administrative action to enforce its selenium limits*: In July 1993, while the state court writ proceedings were pending, the Regional Board announced that it intended to commence an administrative enforcement action against refiners that failed to meet the 50 ppb final selenium discharge limit by the December 12, 1993 deadline. (ER 54, 369 ¶11) In response to the Board's threatened action, and with the WSPA litigation pending in state court, Unocal and two other refiners, Exxon and Shell, entered into negotiations with the Board. Those negotiations resulted in a Stipulation for Settlement and Dismissal of Action ("Settlement") and the Board's issuance of a tentative Cease and Desist Order ("Order"). The Order and Settlement were presented to Regional Board members on November 9, 1993 and issued for public comment the following day. (ER 44-53, 54-60, 369-370)

The Order proposed to defer the date for compliance with the final selenium limit from December 12, 1993, to July 31,

1998. (ER 55, 59) In it, the Board explicitly found that technology did not currently exist to enable the refiners to achieve compliance with the 50 ppb final limit:

> despite extensive research and testing by the six Bay Area refiners at a cost exceeding $5 million, at present there is no known technology that is capable of removing selenium from refinery wastewater in a manner that does not produce large quantities of hazardous waste.

(ER 57 ¶9)[2] Based on this finding, the tentative Order required Unocal, Exxon and Shell to undertake a multi-million dollar project to identify a technology capable of removing selenium in an environmentally acceptable manner, to carry out pilot studies of candidate technologies, and to implement a removal technology or other control strategy to meet the final limits by the new 1998 compliance date. In the meantime, the refiners were obligated to continue to comply with the interim selenium discharge limit. (ER 58-59 ¶1-6)[3] As the second key feature of the negotiated disposition, the proposed Order and Settlement required Unocal, Exxon and Shell to pay $2 million to the State penalty fund and Selenium Mitigation Fund, in two installments of $1 million each. Unocal's share was $780,000. (ER 57 ¶14, 50-51 ¶4)

4. *The Regional Board enters into a Settlement and issues an Order requiring Unocal to make a substantial payment to the State, develop control technology, and meet a revised compliance schedule*: The Regional Board conducted noticed public hearings on the proposed Order and Settlement on December 15, 1993 and January 19, 1994. Testimony and written comments were received from respondent Citizens for a Better Environment ("CBE") and other members of the public. (ER 113-152)

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[2] The Board also found that the only two existing technologies that showed "any promise" did not reduce selenium below the final 50 ppb limit "on a consistent basis." (ER 57 ¶¶9-10, 369 ¶12)

[3] It is undisputed that Unocal has consistently complied with the "interim" selenium limit set by the Board. (ER 292)

In response to testimony by a CBE representative suggesting that the $2 million payment by the refiners was not a penalty (ER 137-138), a member of the Regional Board stated the payments were "penalties, that's plain and simple what it is." (ER 140:5) No other Board member disagreed.

In its written comments on the proposed Order and Settlement, EPA expressed enthusiastic support: "We support a settlement of the [state court] lawsuit since it may be the most effective approach for expediting a reduction in selenium discharges. The [Regional Board] staff have worked diligently to resolve selenium issues in San Francisco Bay ... We are also happy to see the [Board] take enforcement action with the proposed Cease and Desist Order (CDO) ... According to the settlement the refineries will pay a $2 million penalty that will fund: [studies, projects and research]." (ER 253-254, 371 ¶16)

Following the January 19, 1994, public hearing, the Board adopted the final Order and Settlement. App., *infra*, 69a-88a. In accordance with the Order and Settlement, Unocal and the other refiners dismissed their state court writ petition challenging the selenium limits, the Board deferred the final selenium limit until July 1998, and Unocal, Exxon and Shell made the initial $1 million payment within 30 days. The remaining $1 million was paid on January 31, 1995. Unocal timely paid its $780,000 share of the required payments. (ER 68, 79, 95-97)

Although state law (Cal. Water Code §§13320, 13330) authorized administrative and judicial review of the Regional Board Order and Settlement, neither CBE nor any other person sought review by the State Board, or by filing an action in state court. (ER 371-372 ¶¶18-19)

5. *The district court refuses to dismiss CBE's Clean Water Act citizen suit for the same alleged violations*: On March 2, 1994, CBE filed this Clean Water Act citizen suit under 33 U.S.C. §1365(a)(1), seeking civil penalties and an injunction for alleged violations of the 50 ppb selenium discharge limit that had been deferred until 1998 by the Regional Board in accordance with the Order and Settlement. (ER 1-2) (ER 2)

Unocal moved to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), contending that the complaint failed to state a cognizable legal claim and that the district court lacked jurisdiction over this citizen suit. Because the Regional Board had already diligently prosecuted an enforcement action against Unocal for the same violations of the final selenium limits alleged in the complaint, Unocal argued that CBE's citizen suit was barred by section 309 of the Act on the ground that the State's action had been taken under "a State law comparable to" section 309(g) and Unocal had "paid a penalty assessed under * * * such comparable State law * * *." 33 U.S.C. §1319(g)(6)(iii). (ER 29-23)

The district court denied Unocal's motion to dismiss, concluding that the Regional Board's enforcement action was not a bar to this citizen suit because (i) the Board's action was not taken pursuant to a "provision" of California law comparable to section 309(g), and (ii) the payment made by Unocal did not constitute a "penalty" because the Order and Settlement did not label it as such. App., *infra*, 42a-60a.

6. *Unocal appeals*: On Unocal's application, the district court certified its decision for interlocutory appeal, finding that "there is substantial ground for difference of opinion" on the correctness of its ruling of this potentially case-dispositive issue. (ER 382) Two circuits had addressed the same issues and reached conclusions in conflict with the district court's decision. *North & South Rivers Watershed Ass'n* v. *Scituate*, 949 F.2d 552 (1st Cir. 1991); *Arkansas Wildlife Federation* v. *ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, _____ U.S. _____, 115 S.Ct. 1094 (1995). The Ninth Circuit accepted jurisdiction pursuant to 28 U.S.C. §1292(b). (ER 384)

7. *The Ninth Circuit affirms, acknowledging that its decision conflicts with those of two other circuits*: The Ninth Circuit affirmed (App., *infra*, 1a), rejecting Unocal's argument that its payment of $780,000 to the State was a "penalty" under a "comparable state law" within the meaning of section 309(g)(6)(A)(iii) of the Act. Instead, the court held that the payment was not a "penalty" but "a settlement made to avoid an

enforcement action by the Regional Board." App., *infra*, 9a.[4] It also rejected Unocal's argument that the "comparable State law" clause was satisfied because the Regional Board acted pursuant to a statute (Water Code Section 13301) that was part of a *statutory scheme* that included penalty provisions comparable to section 309(g). Cal. Water Code §§13308, 13323-13328, 13350, 13385. Instead, the court held that to preclude a citizen suit for the same violations, the comparability clause required the Regional Board to act pursuant to the *specific* statutory penalty *provision* that corresponded to the administrative penalty provision in section 309(g). App., *infra*, 10a. In reaching this conclusion, the Ninth Circuit acknowledged that its view of the comparability clause was in conflict with decisions of the First and Eighth Circuits in *Scituate* and *Arkansas Wildlife*, each of which had held that the clause was satisfied if the State agency action was taken under a statutory *scheme*, comparable to the Act, that contains a penalty provision like section 309(g). App., *infra*, 10a. Unocal's timely petition for rehearing and rehearing *en banc* was denied on August 15, 1996. *Id.* at 11a. Over CBE's objection, the Ninth Circuit granted Unocal's motion for stay of mandate pending certiorari. *Id.* at 68a.

## REASONS FOR GRANTING THE PETITION

Petitioner Unocal respectfully petitions this Court to grant certiorari in this case to resolve recurring and important questions dividing the circuits as to the proper role of citizen suits in enforcing the Clean Water Act.[5]

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[4] Although it is true that the Regional Board and Unocal reached a settlement, the Regional Board characterized its Order as an "enforcement action." (ER 158) Moreover, EPA's comment on the proposed order applauded the Regional Board's "enforcement action." (ER 253)

[5] In addition to this case, the following is a non-exhaustive list of cases that have addressed section 309(g) of the Act, to (1) limit citizen suits: *Arkansas Wildlife*, 29 F.3d at 381; *Scituate*, 949 F.2d

There are currently more than 75,000 NPDES permits in existence, and there have been hundreds of citizen suits seeking judicial enforcement of such permits or of the discharge limitations of the Clean Water Act itself.[6] Many of those citizen suits, like the one at issue here, involve situations in which there is a pending or completed administrative enforcement proceeding. The proper interpretation of Section 309(g)(6)(A) of the Clean Water Act, the provision barring citizen suits in certain circumstances in which there has been prior regulatory action involving the same alleged violations, is thus a matter of vast practical importance.

The question affects not only businesses, municipalities, environmental regulators, and would-be citizen plaintiffs, but also the federal courts. Under the narrow interpretation given by the Ninth Circuit in this case to the provision barring certain citizen suits, there is a real danger that the federal courts will be called upon to displace state and federal environmental regulatory agencies as primary enforcers of the Clean Water Act.

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at 556; *Saboe* v. *Oregon*, 819 F.Supp. 914 (D. Ore. 1993); *Connecticut Coastal Fishermen's Ass'n* v. *Remington Arms Co.*, 777 F.Supp. 173 (D. Conn. 1991); *aff'd in part rev'd in part* 989 F.2d 1305 (2nd Cir. 1991); *California Sportfishing* v. *City of W. Sacramento*, 905 F.Supp. 792 (E.D. Cal. 1995); *Sierra Club* v. *Colorado Refining Co.*, 838 F.Supp. 1428 (D. Col. 1993); or (2) allow citizen suits: *Knee Deep Cattle Co., Inc.* v. *Bindana Inv. Co. Ltd.*, 94 F.3d 514 (9th Cir. 1996); *Washington Public Interest Research Group* v. *Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993); *Molokai Chamber of Commerce* v. *Kukui, Inc.*, 891 F.Supp. 1389 (D. Hawaii 1995); *Atlantic States Legal Foundation Inc.* v. *Universal Tool & Stamping Co.*, 735 F.Supp. 1404 (N.D. Ind. 1990); *Natural Resources Defense Counsel* v. *Vygen Corp.*, 803 F.Supp. 97 (N.D. Ohio 1992).

[6] In 1988, a survey of 1,209 citizens suits revealed that 882 had been filed under the Clean Water Act. BNA, *Environmental Citizen Suits: Confronting The Corporation* (1988).

The principal underpinning of the Ninth Circuit's ruling is its conclusion that the "comparable State law" provision of Section 309(g)(6)(A) requires not merely that the state law under which the regulators have proceeded be generally comparable to the enforcement provisions of the Clean Water Act, but that they have proceeded specifically under a provision identical to Section 309(g). This ruling is in direct and acknowledged conflict with decisions of the First and Eighth Circuits (*North & South Rivers Watershed Ass'n* v. *Scituate*, 949 F.2d 552 (1st Cir. 1992); *Arkansas Wildlife Fed'n* v. *ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1094 (1995)), which apply the bar to citizen suits so long as the state regulatory proceeding has been conducted under a generally comparable scheme that contains a penalty provision analogous to Section 309, even if the enforcement action does not happen to have been brought directly under the Section 309 analog.

In addition, the court below misconstrued the "penalty assessed" requirement by treating the very substantial monetary payment made to the State on account of the selenium discharges as purely a settlement payment but not a penalty. This ruling also conflicts with the Eighth Circuit's *Arkansas Wildlife* decision, which recognized that the citizen suit preclusion should apply when "a compromise was reached." 29 F.3d at 380.

Finally, as we discuss below, the Ninth Circuit's allowance of citizen suits when state regulators have diligently proceeded with and consummated enforcement proceedings subverts the primacy that the Clean Water Act seeks to give to administrative enforcement efforts and is in substantial tension with the prior decision of this Court in *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation*, 484 U.S. 49 (1987), as well as with decisions of lower courts. Review by this Court is needed in order to clarify the uncertainties that now surround the availability of the citizen suit to trump state enforcement efforts.

### A. The Ninth Circuit's Decision Impermissibly Allows Citizen Suits To Intrude Upon State Enforcement Discretion Under The Clean Water Act, Contrary To This Court's Decision In *Gwaltney*

In 1987, this Court held that the role of a Clean Water Act citizen suit was "to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. at 61, 108 S.Ct. at 383. In rejecting a contention that a citizen suit could be brought for wholly past violations, this Court offered an example that appears plainly inconsistent with the Ninth Circuit decision here:

> Permitting citizen suits for wholly past violations of the Act could undermine the supplementary role envisioned for the citizen suit. This danger is best illustrated by an example. Suppose that the Administrator identified a violator of the Act and issued a compliance order under § 309(a). Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obligated to take. *If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forego, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities.* Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. *We cannot agree that Congress intended such a result.*

*Id.* at 61, 108 S.Ct. at 383 (emphasis added).

Congress indeed did not intend such a result. In fact, soon after the *Gwaltney* decision, Congress further narrowed the interstitial role[7] of citizen suits by enacting the provision at

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[7] The enforcement authority of the EPA and the states is broader than that of a citizen under the Act. As this Court made clear in

issue here, section 309(g)(6), which bars such suits when the Administrator of EPA or the state regulator had initiated or concluded administrative enforcement proceedings. Specifically, this provision bars a citizen suit when (i) the Administrator has commenced and is diligently prosecuting an administrative penalty action, (ii) a State has commenced and is diligently prosecuting an administrative action under a state law comparable to Clean Water Act section 309(g), or (iii) the Administrator or the State has issued "a final order not subject to further judicial review and the violator has paid a penalty [under § 309(g)] or such comparable State law."[8]

In this case, the State of California, acting through its Regional Water Quality Control Board, commenced an administrative enforcement action in 1993, alleging violations of new final NPDES permit limits for selenium discharges. Following negotiations with Unocal and other dischargers and noticed public hearings, the Board issued a final Order pursuant to a Settlement under which Unocal and two other oil refiners were required to pay $2 million, undertake multi-million dollar research efforts to develop selenium control technology, and achieve compliance with the final selenium limits by July 1998, all while maintaining compliance with interim selenium limits.[9]

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*Gwaltney*, the government may seek penalties for both wholly past violations and for ongoing violations of the Act pursuant to sections 309(d) and (g), but a citizen suit is limited under section 505(a) to ongoing violations only. 33 U.S.C. §§ 1319(d), (g), 1365(a)(1); *Gwaltney*, 484 U.S. at 56-59; 108 S.Ct. at 381-382; *see* Cal. Water Code § 13385(a).

[8] Prior to 1987, a citizen suit was barred only by an EPA or State action diligently prosecuted *in court*. 33 U.S.C. § 1365(b)-(1)(B); *Sierra Club* v. *Chevron U.S.A., Inc.*, 834 F.2d 1517 (9th Cir. 1987).

[9] Unocal has consistently and completely complied with the Regional Board's Order, having paid its share of the $2 million that was ordered, pursued selenium control technology projects, and

The State's administrative enforcement of the Clean Water Act makes citizen enforcement both unnecessary and inappropriate. Citizen enforcement is unnecessary because the Board had already taken diligent enforcement action for the selenium violations now alleged in the citizen suit. Citizen enforcement is inappropriate because, as this Court contemplated in *Gwaltney*, the government accomplished exactly what it intended by initiating enforcement — it recovered money from the dischargers, obtained commitments to develop a viable selenium control technology, and established a schedule for compliance with final selenium limits.

The citizen plaintiffs contend, however, that Unocal is currently in violation of the final selenium limits, which the Board deferred to July 1998 by the Order and Settlement. The Ninth Circuit's authorization of the citizen suit despite state administrative enforcement has thus created the untenable result that Unocal now has two selenium limits: (1) the interim 5.6 pounds per day limit that the Board Order required Unocal to meet until July 1998, and (2) the deferred .85 pounds per day (and 50 ppb) final limit. The Ninth Circuit has concluded that this final limit can be a basis for a citizen suit *now*, before the compliance date set by the Regional Board.

Moreover, the citizen suit seeks an award of civil penalties — payable to the government[10] — even though the State

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consistently achieved 100 percent compliance with the mandated interim selenium limits. (ER 95-97, 292)

[10] The Clean Water Act did not create a private right of action for citizens. The citizen suit may be brought for penalties payable only to the government, not for damages to the citizen or citizen group. *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11, 101 S.Ct. 2615, 2621 (1981). Where the government has either accepted an amount in compromise, or agreed to forego civil penalties altogether, a subsequent citizen suit undermines the enforcement discretion of the Administrator or the State. *Gwaltney*, 484 U.S. at 61.

has already settled its civil penalty claims with the dischargers, has collected $2 million, and has imposed significant and costly compliance obligations.

If allowed to stand, the Ninth Circuit decision would create the following Clean Water Act enforcement anomalies:

- Congress intended that the government have broad enforcement authority and that citizen suits perform a narrow "interstitial" role. In this case, neither the EPA Administrator nor the state agency can enforce final selenium limits until July 1998; yet the Ninth Circuit has allowed a citizen suit to seek injunctive relief to enforce those deferred final limits now.
- The State decided to resolve its civil penalty claims for $2 million, plus selenium treatment technology projects not otherwise required of the dischargers, and a final selenium compliance schedule. EPA applauded the State's enforcement action, including the "penalty." Yet, the Ninth Circuit has allowed a citizen suit to seek civil penalties payable to the government in an amount greater than the government accepted as appropriate.[11]

The result of the Ninth Circuit opinion is an expansion of citizen suit enforcement beyond the supplemental role created by Congress and described by this Court in *Gwaltney*, which role was narrowed further by Congress in 1987. Under the Ninth Circuit opinion, a citizen suit may be brought to seek penalties

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[11] In the California Regional Board proceedings, CBE urged the government to require *larger* penalty payments from the dischargers. (ER 137-138) California law afforded CBE a right of administrative review of the Regional Board's order by the State Water Resources Control Board, and judicial review by the California courts. Cal. Water Code §§13320, 13330. CBE chose not to pursue *any* review of the Order under applicable state law, including review of the amount that the dischargers were required to pay. The Order became "final" for purposes of section 309(g) after 30 days. *Id.*

the government has chosen to forego, and to seek injunctive relief contrary to the terms of the State's own compliance order, regardless of how diligent and thorough the State's enforcement action has been.

### B. The Decision Below Violates The Section 309(g) Bar On Citizen Suits, Offends The Strong Public Policy Favoring Settlements, And Conflicts With Decisions Of The First And Eighth Circuits.

The Ninth Circuit held that "the fairest characterization of the payment at issue is that it was, indeed, a settlement made to avoid an enforcement action by the Regional Board" and "not a penalty but, instead, the price of avoiding the stigma of a formal enforcement action." App., *infra*, 8a.[12]

The Ninth Circuit's unprecedented distinction between payment of a civil penalty after a formally adjudicated, publicly contested enforcement action and payment of a settlement amount to resolve civil penalty liability after formal public comment and hearings (1) is contrary to decisions of the First and Eighth Circuits interpreting the "comparable State law" provision of the Act, (2) is based on a narrow view of the "comparable State law" provision that is at odds with the language and intent of the Act, (3) misconstrues the "penalty assessed" provision of the Act by excluding payments made to settle state enforcement actions, and (4) undermines the strong national policy favoring settlement rather than protracted litigation of disputes.

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[12] The Ninth Circuit wrote: "UNOCAL itself insisted on characterizing the financial transfer as a 'payment' and not a 'penalty' at the time of the state action settlement." App., *infra*, 8a. This not a fair characterization of the record. At the December 15, 1993 administrative hearing before the Regional Board, Unocal's counsel said, " * * * I think, for all practical purposes, it is, in fact, a penalty. It's viewed by EPA as a penalty in its letter. I think the Board considers it a penalty." (ER 150:15-18)

### 1. The Ninth Circuit's interpretation of the "comparable State law" provision conflicts with decisions of the First and Eighth Circuits.

The Ninth Circuit acknowledged that California Water Code section 13385, the State penalty provision, is comparable to section 309(g). App., *infra*, 9a. But it concluded that Unocal's $780,000 payment was not assessed or paid under section 13385, and was instead the product of a settlement embodied in the Cease and Desist Order issued under Water Code section 13301. Because section 13301 was cited by the Regional Board (*id.* at 77a-78a) and because that specific section of the Water Code does not contain a penalty provision, the Ninth Circuit held that Unocal's payment was not assessed under a law comparable to section 309(g). App., *infra*, 11a. The Ninth Circuit acknowledged, however, that its view of comparability was in conflict with that of the First and Eighth Circuits. *Ibid.*

In *Arkansas Wildlife*, the Eighth Circuit considered whether section 309(g)(6)(A)(ii)[13] of the Act barred a citizen suit alleging violations embraced within a State administrative settlement and consent order that provided for a compliance schedule and $2,500 in negotiated penalties. The citizen suit plaintiff argued that the administrative order was issued under a *provision* of State law that was not comparable to section 309(g). The Eighth Circuit rejected plaintiff's argument, holding that the State administrative order precluded a citizen suit for the same violations that had been settled because the State had taken diligent enforcement action under a State law *scheme* that was comparable to section 309(g). *Arkansas Wildlife*, 29 F.3d at 381-382. It observed that "the states are afforded some latitude in selecting the specific mechanisms of their enforcement program." *Id.* at 380. The court accordingly held that "comparability" is satisfied when the state's "overall regulatory

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[13] This case concerns section 309(g)(6)(A)(iii), not section 309(g)(6)(A)(ii), addressed in the First and Eighth Circuit cases. However, the plain language and structure of the statute shows that the "comparability" inquiry is the same under both subsections.

scheme" under which the agency acted: (1) "contains comparable penalty provisions," (2) has "the same overall enforcement goals," and (3) provides citizens "a meaningful opportunity to participate" in the decision-making process so as to safeguard their interests. *Id.* at 381.

Similarly, the First Circuit in *Scituate* rejected the plaintiff's argument in that case that to be "comparable" to section 309(g) and thereby preclude a citizen suit, it is necessary that "the precise statutory section under which the State issued its Administrative Order contains penalty provisions comparable to the Federal Act." *Scituate*, 949 F.2d at 556. The First Circuit reasoned instead that "comparability" under subsection (A)(ii) was satisfied when the overall state statutory scheme contained a penalty provision comparable to the Act and the State agency was diligently prosecuting an enforcement action under that scheme. From that premise, the First Circuit held that a citizen suit was barred whether or not the state agency actually imposed a "penalty." *Scituate*, 949 F.2d at 555-557; *accord Supporters to Oppose Pollution, Inc.* v. *The Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) (citing *Scituate* with approval in a RCRA citizens suit). The First Circuit further reasoned that because Congress amended the Act for the express purpose of precluding duplicative citizen suits after a state agency has already taken enforcement action, deference to diligent state administrative action is required whether or not the penalty provision is employed in any particular case. *Scituate*, 949 F.2d at 556.[14]

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[14] The Ninth Circuit rejected *Scituate* by relying on its earlier decision in *Pendleton*, 11 F.3d at 885. App., *infra*, 11a. In fact, *Pendleton* is not controlling here because it did not address citizen suit preclusion by State enforcement action. Rather, *Pendleton* addressed very different language in subsection (A)(i) precluding citizen suits when EPA prosecutes an action "under this subsection." *Pendleton*, 11 F.3d at 886. "Comparability" was not an issue in *Pendleton*.

Unocal's case is far more compelling not only because the Board acted pursuant to a California statutory scheme that the Ninth Circuit acknowledged contains a "comparable" penalty provision but also required Unocal to pay $780,000, commit to a multi-million dollar research and development effort to implement an environmentally-acceptable selenium control technology, and agree to achieve compliance with the final selenium limit by July 1998 and to comply with the interim selenium limit until that date. (ER 68)

**2. The Ninth Circuit's "comparability" rationale is not required by the plain language of the Act and is contrary to the intent of the Act.**

None of the three reasons cited by the Ninth Circuit to support its narrow view of "comparability" withstands analysis.

First, contrary to the Ninth Circuit's grudging view, it is not clear that requiring State agency reliance on the precise provision in State law authorizing administrative penalties "is the plainest reading" of the words "comparable State law." App., *infra*, 12a. Congress explicitly stated that comparable means "similar" or "analogous," not identical. 1 *Legislative History of Water Quality Act of 1987*, at 367 ("*Leg. Hist.*").

In fact, an earlier version of the 1987 legislation contained a provision requiring the State agency to be "diligently pursuing assessment of a civil penalty under section 309(g) of this Act." 2 *Leg. Hist.* 1103, 1174 (1987). That more specific provision was deleted and the more general "comparable State law" language was enacted instead. As the concurring opinion in *Scituate* aptly reasoned, requiring the State agency to recite precisely the State law penalty provision which was the source of its action would "Balkanize" the intended uniform application of the Act by having comparability turn on semantics rather than substance. *Scituate*, 949 F.2d at 559 (concurring opinion).

Second, the Ninth Circuit found comparability lacking because settlements might not be subject to public notice, comment and assessment procedures applicable to penalties to ensure the amount is of sufficient "magnitude." App., *infra*, 12a. The

hypothetical concern about the need for public scrutiny is not supported by the law or the record of this case. The California statutory scheme governing the Order and Settlement, consistent with the federal regulations, requires public scrutiny that matches the requirements of the federal statute, specifically including notice, public comment and a public hearing. Cal. Water Code §§13301, 13302; 40 CFR §123.27(d)(2)(iii). CBE actively participated in all aspects of this public review process, including *two* public hearings. (ER 43-60, 113-159) Both *Scituate* and *Arkansas Wildlife* held that to be comparable, the review proceedings under the state statutory scheme need not be identical to federal law, but only must ensure a similar level of public participation. That standard was plainly exceeded in this case.

Similarly, the "amount" or "magnitude" of the payment does not determine whether the settlement was a penalty; these words do not appear in section 309(g)(6)(A)(iii). In fact, a proposal to require that the amount of "the State imposed penalty is appropriate" was deleted from the 1987 amendments of the Act. *Compare*, 2 *Leg. Hist.* 828 and 1162 (1987). That deletion indicates that no such requirement exists. *Russello* v. *United States*, 464 U.S. 16, 23-24, 104 S.Ct. 296, 300-301 (1983).

In any event, the amount paid by Unocal, $780,000, not only far exceeded the $2,500 penalty upheld by the Eighth Circuit in *Arkansas Wildlife*, but is five times the $125,000 maximum penalty that EPA could have imposed under the federal statute. 33 U.S.C. §1319(g)(2)(B). Thus, by any standard, the amount paid by Unocal is plainly "comparable" to any penalty authorized by the federal statute. If EPA believed that the Settlement was inadequate, it could have filed its own penalty action. 40 CFR §123.27(c). Instead, EPA blessed the Settlement, including the "penalty" paid. (ER 253-254)

Third, the Ninth Circuit thought it would be "anomalous" to conclude that State agency enforcement actions "would more broadly preclude citizen suits" than EPA enforcement actions. App., *infra*, 12a. In fact, the language and structure of the Act

does provide for broader preclusion based on State agency actions. Section 1251(b) expressly states: "[i]t is the policy of the Congress to recognize, preserve, and protect *the primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution." 33 U.S.C. §1251(b) (emphasis added). And the Ninth Circuit has elsewhere recognized that section 1251(b) expresses the intent of the Act to "afford states as much control as possible over implementation and enforcement of pollution controls." *Boise Cascade Corp.* v. *U.S.E.P.A.*, 942 F.2d 1427, 1433 (9th Cir. 1991).

The legislative history of the Act likewise makes clear the primacy of State agency enforcement and that such primacy is grounded in federalism: "The Committee again, however, notes that the authority of the federal government should be used judiciously by the Administrator in those cases [that] deserve federal action because of their national character, scope or seriousness. The Committee intends the great volume of enforcement actions be brought by the State." Sen. Rep. No. 92-414, 92d Cong. 1st Sess., p. 64 (1971).

Citing this Congressional history, this Court concluded that citizen suits are proper only when State agencies fail to exercise their enforcement responsibility. *Gwaltney*, 484 U.S. at 60. In this case, the Regional Board took vigorous enforcement action, so the duplicative citizen suit seeking to have the federal courts second-guess that action is unnecessary and should be barred.

**3. The Ninth Circuit decision misconstrues the "penalty assessed" provision of the statute by excluding payments made to settle state enforcement actions.**

Section 309(g)(6)(A)(iii) of the Act provides that a citizen suit is barred when "the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be * * *." 33 U.S.C. §1319(g)(6)(A)(iii).

The Ninth Circuit's decision draws an unwarranted and unnecessary distinction between civil penalties imposed follow-

ing an adjudicated enforcement proceeding and amounts paid in settlement to resolve the state's civil penalty claims in administrative enforcement proceedings. The Regional Board did take administrative enforcement action against Unocal (App., *infra*, 69a-81a), and it settled that enforcement action following an open public process that included notice, public comment, and hearings in which CBE actively participated. (ER 43-60, 113-152, 153-159, 253-255). The settlement required, among other things, substantial payments by Unocal and others to resolve the State's civil penalty claims.

For purposes of the citizen suit bar, it should make no difference whether Unocal paid something formally denominated a "penalty" following administrative adjudication, or whether Unocal paid to settle the civil penalty claims asserted by the state. Congress intended to encourage, not discourage, settlement of penalty actions as a means of funding environmental protection projects and thus furthering the goals of the Act. 2 *Leg. Hist.* 828. EPA regulations interpreting the Act likewise provide for "settlement of a State enforcement action" following notice and public comment on the proposed settlement. 40 C.F.R. §123.27(d)(2)(iii).

In direct conflict with the Ninth Circuit, the Eighth Circuit observed that "it would be unreasonable and inappropriate to find failure to diligently prosecute simply because [the dischargers] prevailed in some fashion or because a compromise was reached." *Arkansas Wildlife*, 29 F.3d at 380. The court rejected an argument that the State had negotiated and accepted "insignificant amounts of civil penalties" in comparison to the maximum penalties that could have been assessed. *Id.* Thus, the Eighth Circuit's reasoning recognizes that a payment in settlement qualifies as a "penalty assessed" under the statute.

By contrast, the Ninth Circuit constructed an artificial distinction between a "penalty" resulting from a "formal enforcement action" by the State and a settlement paid to the State to resolve civil "penalty" liability. App., *infra*, 9a. Both should be viewed as a "penalty assessed" for purposes of the citizen suit bar in section 309(g). 33 U.S.C.

§1319(g)(6)(A)(iii). However, under the Ninth Circuit's view, a settlement would apparently never constitute "a penalty assessed" under the Act, even if the word "penalty" were used to describe a payment made by a discharger to resolve its potential penalty liability.[15]

In fact, the Ninth Circuit opinion fails to mention that the EPA and the Regional Board *did* consider the settlement payment to be a "penalty." EPA stated: "We are also happy to see the RWQCB *take enforcement action* with the proposed Cease and Desist Order * * *. According to the *settlement*, the refineries will pay a $2 million *penalty* that will fund * * * consultants to oversee the treatment technology research." (ER 253-54, emphasis added)[16] Similarly, a Regional Board member stated at one of the two public hearings: "It is *penalties*, that's plain and simple what it is." (ER 140:5, emphasis added) No other Board member disagreed.

Apart from the stated beliefs of the two agencies charged with enforcement of the Act, Unocal's $780,000 payment was a penalty in substance and as a matter of law. There is nothing else it could have been; no other civil payment is contemplated by State law or the Act. Indeed, ten percent of the payment was specifically earmarked for deposit in the account designated for

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[15] Although the payment was not labelled a "penalty" in the Settlement (App., *infra*, 84a-85a) this Court has recognized that the "label" used is not controlling; it is the "substance" of the action that is relevant. *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 492-493 (1958). In fact, the specific section of state law that the Ninth Circuit and CBE agree is a "comparable" penalty provision, Water Code section 13385, does not use the label "penalty" but rather the term "civil liability."

[16] After filing its citizen suit, CBE asked EPA to "clarify" its position. EPA responded: "Although the comment letter describes the payment of money by the refineries as a 'penalty,' this term was not used with any intention of describing the preclusive effect of that payment under section 309(g)(6)." (ER 299)

civil penalties by State law. App., *infra*, 84a-85a. Cal. Water Code §13385(i). The remainder of the payment went to a new State Selenium Mitigation Fund, consistent with the intent of Congress that "settlements of fines and penalties" be "used to fund research, development and other related projects which further the goals of the Act." 2 *Leg. Hist.* 828 (1987).

The Ninth Circuit also reasoned that the $780,000 payment was not a "penalty" because, in considering its enforcement options, the Regional Board declined to invoke its administrative penalty authority under Water Code section 13385. App., *infra*, 7a. Instead, the Board invoked the cease and desist order provision, Water Code section 13301, stating: "the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order." App., *infra*, 77a-78a.

The flaw in the Ninth Circuit's reasoning is that there was no need for the Regional Board to invoke the state penalty statute because the refiners, including Unocal, had already agreed to settle their penalty liability with a $2 million payment. The Board cited section 13301 because that statute provided legal authority for issuing the cease and desist order and undertaking the remainder of the settlement: (1) requiring the refiners to study, develop, and implement selenium control technology, and (2) deferring compliance with the final selenium limit to 1998. App., *infra*, 78a-80a. *See* Cal. Water Code §13301 (empowering Board to issue cease and desist orders requiring "appropriate remedial or preventive action" and directing the discharger to "comply in accordance with a time schedule set by the Board").

The Order issued by the Regional Board and the Settlement were fully consistent with the Clean Water Act and this Court's interpretation of the Act in *Gwaltney*. This Court held that state and federal authorities have discretion "not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action." *Gwaltney*, 484 U.S. at 60-61, 108, S.Ct. at 383. In this case, Unocal was ordered to undertake groundbreaking selenium control technology, an expensive

project (App., *infra*, 72a-73a), because the Board recognized that no such technology existed. *Id.* at 72a-76a. The Board *also* collected $2 million as part of the settlement.[17]

In sum, a payment "assessed" by the State should be considered a penalty for purposes of section 309(g) of the Act whether it is the result of a formal administrative adjudication proceeding or a negotiated settlement. A penalty that is the product of a settlement of an administrative enforcement proceeding by a state agency is no less a product of the enforcement authority that gives rise to the citizen suit bar than a penalty paid following adjudication of the State's administrative claims. Congress drew no distinction between adjudicated penalties and penalties paid in settlement, and the courts should not do so either.

**4. The Ninth Circuit's decision violates strong public policy favoring settlements.**

The Ninth Circuit held that a discharger who settles an administrative penalty action brought by the government does so at the peril of confronting a subsequent citizen suit for the same claims that were settled.

Carried to its logical conclusion, the Ninth Circuit decision will dissuade NPDES dischargers from settling Clean Water Act

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[17] The Ninth Circuit mistakenly accepted the assertion of the United States, as *amicus curiae*, that the Board's failure to invoke the state penalty statute allowed Unocal to avoid review of the amount of the penalty pursuant to the penalty assessment factors in the state statute, Water Code section 13385(e), analogous to those in section 1319(g)(3) of the Act. App., *infra*, 8a-9a. In fact, there can be no plausible claim that the penalty was inadequate. The Board was presumably aware of the assessment factors, but it was not required to address them expressly because the amount was determined by settlement, not by a contested enforcement proceeding. Indeed, the amount collected from Unocal, $780,000, far exceeded the $125,000 maximum penalty EPA can assess even using the statutory factors. 33 U.S.C. §1319(g)(2)(B).

administrative claims brought by federal or state agencies. As courts have recognized, "It is doubtful that an alleged violator would fully cooperate with [the State agency] to resolve [certain violations] if they lacked assurance that the same violation would not be the subject of a citizens suit in federal court at some later time." *Saboe* v. *Oregon*, 819 F.Supp. 914, 918 (D.Or. 1993). Instead of focusing their resources on negotiated environmental research and corrective action, dischargers would have to engage in protracted and expensive litigation.

Thus, the Ninth Circuit decision deters the very kind of dispute resolution the law should encourage: an arm's-length, good-faith settlement between the agency and the regulated party, arrived at on threat of formal action, but resolved with concessions by both sides before formal adversary proceedings became necessary. Settlement allows the parties to focus their resources on developing technology to improve water quality rather than on litigation. Such agreements, especially when subject to public scrutiny and blessed by EPA, must be upheld not undermined.

Under the Ninth Circuit's narrow view of the Act, such timely, negotiated resolutions of enforcement actions will be insufficient to preclude unnecessary, duplicative citizen suits, even when the agency has given the public and EPA ample opportunity for scrutiny and comment and State law affords the right to judicial review of the agency action. Nothing in the Act justifies the Ninth Circuit's counter-productive conclusion.

Such an outcome not only cannot be what Congress intended but also violates this nations's strong public policy favoring the settlement of disputes to avoid protracted and wasteful litigation. This Court has consistently recognized that settlement of disputes is strongly favored and should be encouraged to preserve scarce judicial resources and ease crowded court dockets. *E.g.*, *Williams* v. *First National Bank*, 216 U.S. 582, 595, 30 S.Ct. 441, 445 (1910); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017 (1974).

As this Court recognized in *Gwaltney*, duplicative and unnecessary citizen suits that simply replicate diligent state

administrative enforcement actions that have been resolved by settlement undermine important national environmental policies. 484 U.S. at 60-61. Without the authority to enter into a settlement that bars a citizen suit, the state loses a crucial weapon in its arsenal for achieving the Act's water quality goals, directing its effort at environmental corrective action rather than litigation, with its attendant costs and delay. The policy favoring settlement "has particular force" where an agency "has pulled the laboring oar" to reach agreement that will "promote early completion of cleanup activities." *United States* v. *Cannons Engineering Corp.*, 899 F.2d 79, 84, 90-91 (1st Cir. 1990).

The Ninth Circuit's holding that a settlement payment cannot be a penalty subverts the structure of the Act and invites pointless litigation. In the Ninth Circuit, a permittee now must fight rather than settle in order to avoid a citizen suit. Such a result is contrary to public policy and this Court's decision in *Gwaltney*.

In sum, this Court should grant certiorari to resolve the nationally significant issues created by the Ninth Circuit's narrow view of both the "penalty assessed" provision and the "comparable State law" requirement. The Ninth Circuit's approach should be rejected in favor of the better founded decisions of the First and Eighth Circuits precluding citizen suits when state regulatory action leads to a settlement, and finding comparability based on the overall statutory scheme under which the State agency acted.

### C. The Issue Presented Is A Recurring One Of National Significance.

Under the Clean Water Act, every discharger of wastewater to the waters of the United States must have an NPDES permit. 33 U.S.C. §1342. There are more than 75,000 active NPDES permits nationally. All such dischargers must deal either with a state agency or EPA on compliance issues every time a permit standard is arguably exceeded. Under the Ninth Circuit decision, even if the agency and the discharger agree on a compliance or enforcement solution, the discharger may be

subject to a costly citizen suit second-guessing and potentially undermining the agency determination.

For example, based on the decision in this case, another Ninth Circuit panel recently held that a citizen suit is not barred under section 309(g)(6)(A)(ii) even though the State agency had initiated an enforcement action, but then settled with the discharger for (1) payment of a $1,400 penalty, (2) a stipulated order requiring a sewage treatment plant upgrade at a cost of $175,000 to $200,000, and (3) compliance with interim discharge limits during construction, in exchange for foregoing further penalties. *Knee Deep Cattle Co.* v. *Bindana Inv. Co., Ltd.*, 94 F.3d 514, 515 (9th Cir. 1996). The Ninth Circuit overturned a well-reasoned district court decision applauding the State agency for acting "to eliminate pollution through a settlement agreement" under which "defendants are building a new sewage treatment plant." *Knee Deep Cattle Co.* v. *Bindana Investments Co.*, 904 F.Supp. 1177, 1183 (D. Or. 1995). Applying its decision in this case, the Ninth Circuit held that, despite the settlement and order, the Oregon agency was not diligently prosecuting an action for penalties under a state law comparable to section 309(g). *Knee Deep*, 94 F.3d at 516-517. Allowing such a duplicative and unnecessary citizen suit that alleges the same violations resolved by state administrative enforcement contravenes this Court's teaching in *Gwaltney*.

Until the issues presented by this case are resolved nationally by this Court, companies and municipalities with NPDES permits in the First and Eighth Circuits will be treated differently and able to operate with more certainty — the certainty to which they are entitled — than those in the Ninth Circuit. Those in other circuits will remain in limbo as to which standards may apply in their jurisdiction: (1) the view of the Ninth Circuit that allows citizen suits to second-guess state action, or (2) the views of the First and Eighth Circuits that, consistent with *Gwaltney*, preclude unnecessary and duplicative citizen suits where the state has taken enforcement action. This uncertainty is bound to disrupt and complicate state regulatory efforts and needlessly burden federal courts.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 13, 1996

## APPENDIX A

CITIZENS FOR A BETTER ENVIRONMENT CALIFORNIA, San Francisco Baykeeper, Save San Francisco Bay Association, The Bay Institute of San Francisco, Santa Clara Valley Audubon Society, Kalon Wofford and Anthony Willis, Plaintiffs-Appellees,

v.

UNION OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Appellant.

No. 95-15139.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 8, 1996.

Decided May 13, 1996.

As Amended July 16, 1996.

Before: BROWNING and JOHN T. NOONAN, Jr., Circuit Judges, and MERHIGE, Senior District Judge.*

MERHIGE, Senior District Judge:

This case arises under the federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1251, *et seq.* The Appellees, Citizens for a Better Environment, et al. ("CBE"), brought this action in the federal district court for the Northern District of California pursuant to the citizen suit provision of that Act, 33 U.S.C. § 1365. In the Complaint, CBE asserted a claim for violations of the Clean Water Act effluent standards, a claim for violations of Clean Water Act water quality standards, and a state law claim. Although the

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* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

district court granted the motion of the Appellant, Union Oil Company of California ("UNOCAL"), to dismiss as to the water quality standards claim, the district court denied UNOCAL's motion to dismiss, premised on 33 U.S.C. § 1319(g)(6)(A)(ii) and (iii), as to the effluent standards claim and the dependent state law claim. The district court certified its order denying UNOCAL's motion to dismiss for immediate appeal pursuant to 28 U.S.C. § 1292(b).

## I.

The Clean Water Act regulates the discharge of pollutants into navigable waters. The Act prohibits all discharge of pollutants except inasmuch as one of several enumerated statutory exceptions applies. 33 U.S.C. § 1311(a). One such exception is where the polluter has been issued a National Pollution Discharge Elimination System ("NPDES") permit. 33 U.S.C. § 1342. The effluent discharge standards or limitations specified in an NPDES permit define the scope of the authorized exception to the prohibition in § 1311(a). Authority to administer the NPDES permit system may be delegated to a state or regional agency where the state or regional regulatory scheme meets certain criteria. 33 U.S.C. § 1342(b). The entity responsible for issuing permits in the San Francisco Bay area of California is the California Regional Water Quality Control Board, San Francisco Region (the "Regional Board"). Private citizens may bring suit pursuant to 33 U.S.C. § 1365 to enforce effluent standards or limitations, which are defined as including violations of 33 U.S.C. § 1311(a). 33 U.S.C. § 1365(f)(1).

UNOCAL owns and operates a petroleum refinery in the San Francisco Bay area of California. Wastewater from the refinery is subject to UNOCAL's NPDES permit issued by the Regional Board. On February 20, 1991 the Regional Board issued Order No. 91-026, which amended the UNOCAL's NPDES permit for the San Francisco Bay area refinery. The order set a "final" concentration limit on selenium discharges of 50 parts per billion ("ppb") and a

mass emission rate of .85 pounds per day, calculated on a running annual average. The final selenium limitation was to take effect December 12, 1993. On June 16, 1991 the Regional Board issued Order No. 91-099 amending UNOCAL's NPDES permit to include an "interim limit" less stringent than the final limit which took effect immediately and which was to remain in force until the final limit came into effect. UNOCAL is in substantial compliance with the interim limit but is not in compliance with the final limit.

The Regional Board issued these orders pursuant to 33 U.S.C. § 1314(*l*) of the Clean Water Act, which required the Regional Board to adopt individual control strategies for discharges into waters determined by the United States Environmental Protection Agency ("EPA") or the state to be impaired. The Regional Board listed San Francisco Bay as a "hot spot" under § 1314(*l*) on the ground that it failed to meet the "applicable water quality standard" of the Clean Water Act "due entirely or substantially to discharges from point sources of any toxic pollutants." *See* 33 U.S.C. § 1314(*l*)(1)(B).

The state water board denied an appeal by UNOCAL and other refiners challenging the selenium discharge limits. Shortly thereafter, on October 12, 1992, UNOCAL and others filed a petition for a writ of mandate in the Solano County Superior Court of California seeking to set aside the interim and final limits on the grounds that the Regional Board's listing of the San Francisco Bay as a "hot spot" violated the Clean Water Act and its implementing regulations.

Over the course of 1993, UNOCAL and others were in settlement discussions with the Regional Board. Although other refiners in the area became able to meet the final limits, UNOCAL and other refiners maintained their inability, due to technological constraints, to meet the final selenium limits. On November 8, 1993, UNOCAL, along with other refiners, reached a settlement agreement whereby UNOCAL and others

would dismiss the state lawsuit and the Regional Board would adopt a proposed cease and desist order ("CDO"). The parties dispute whether the settlement agreement and proposed CDO were released for public comment on November 9, 1993 or November 12, 1993. On November 19, 1993 and December 15, 1993 public hearings were held on the proposed CDO at which CBE participated. The Regional Board, with some minor modifications, issued the CDO on January 19, 1994 as Order No. 94-015.

The principal elements of the settlement agreement and the CDO were that UNOCAL and the other refiners dismissed their state court lawsuit without prejudice, UNOCAL and others paid the state a total of $2 million ($780,000 of which was contributed by UNOCAL), and the Regional Board issued the CDO which, among other things, relieves UNOCAL and others from meeting the final selenium limit until July 31, 1998. The CDO states, with respect to the latter element, that:

> Compliance with this Order shall be in accordance with the following tasks and time schedules:
>
> ....
>
> c. The dischargers shall implement a removal technology or technologies, or an alternate control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge limitations as specified in [the NPDES permits] and shall comply with these limits, no later than July 31, 1998.

CBE filed this lawsuit on March 2, 1994. On July 8, 1994, the district court dismissed the water quality standards claim. The district court subsequently certified the question of its denial of the motions to dismiss as to the other claims for immediate appeal pursuant to 28 U.S.C. § 1292(b).

## II.

UNOCAL asserts two arguments as to why dismissal of the effluent standards claim is proper. First, UNOCAL argues that dismissal is warranted because the citizen suit is barred under § 1319(g)(6)(A)(ii) and § 1319(g)(6)(A)(iii). Second,—UNOCAL urges that dismissal for failure to state a claim is appropriate because the CDO issued by the Regional Board had the effect of extending until 1998 the deadline for complying with the final selenium limits specified in the NPDES permit and, thus, there is no effluent standards violation. The Court reviews each of these questions of law de novo. *Kruso* v. *International Tel. & Tel.*, 872 F.2d 1416, 1421 (9th Cir. 1989).

### A. Is the Citizen Suit Barred Under 33 U.S.C. § 1319(g)(6)(A)(ii) or § 1319(g)(6)(A)(iii)?

33 U.S.C. § 1365 generally authorizes private citizens to sue those violating, among other things, "an effluent standard or limitation" under the Clean Water Act. 33 U.S.C. § 1319(g)(6) sets out certain instances where these citizen suits are barred. The provisions of § 1319(g)(6)(A) are precisely designed to preclude citizen suits which would be duplicative of an "administrative penalty action." *See Washington Public Interest Research Group* v. *Pendleton Woolen Mills*, 11 F.3d 883, 885 (9th Cir. 1993).

The citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, provides, in relevant part:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—
>
> > (1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator [of the EPA] or a State with respect to such a standard or limitation....

> The district courts shall have jurisdiction ... to enforce such an effluent standard or limitation, or such an order, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(a).

Section 1319(g)(6) provides, in relevant part:

> [A]ny violation—
>
> > (i) with respect to which the Administrator [of the EPA] or the Secretary [of the Army] has commenced and is diligently prosecuting an action under this subsection,
> >
> > (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
> >
> > (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

33 U.S.C. § 1319(g)(6)(A).

**1. Applicability of § 1319(g)(6)(A)(iii)**

§ 1319(g)(6)(A)(iii) precludes this citizen suit if the CDO at issue in this case is a "final order not subject to further judicial review," and if UNOCAL has paid a "penalty" that was "assessed under this subsection, or such comparable State law." Because UNOCAL has not paid a "penalty" "assessed under ... comparable State law" the Court concludes that CBE's suit is not barred by § 1319(g)(6)(A)(iii).

**a. "penalty"**

UNOCAL maintains that the $780,000 it paid to the Regional Board constituted a "penalty" within the meaning of § 1319(g)(6)(A)(iii). The district court concluded that the $2 million payment, of which UNOCAL's payment was a part, was not a penalty but "was simply settling the refineries' state court lawsuit." The district court noted that the CDO refers to a "payment" not a "penalty" and that the CDO clearly stated that it was issued pursuant to the Regional Board's authority under California Water Code § 13301, governing cease and desist orders. The district court also noted that in the CDO the Regional Board "expressly declined to invoke its [California Water Code] § 13385 authority" to impose a civil penalty.[1]

UNOCAL argues, essentially, that it has paid out over $780,000 (10% of which went into the California Water Pollution Cleanup and Abatement Account that is the repository of fines levied pursuant to § 13385, and 90% into

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[1] The CDO states, in part, that:

> [t]he Regional Board has considered the various enforcement and penalty options available to it regarding the violation [of the NPDES permit], including the issuance of a cease and desist order or a cleanup or abatement order, imposition of an administrative civil penalty and referral to the Attorney General for civil prosecution. Under the circumstances detailed in the Findings set forth above, the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order.

a "Selenium Mitigation Fund")[2] and that it elevates form over substance to call this anything other than a "penalty."

In support of the formal reasoning of the district court, CBE asserts two additional reasons why UNOCAL may not characterize the payment as a penalty. First, UNOCAL itself insisted on characterizing the financial transfer as a "payment" and not a "penalty" at the time of the state action settlement. CBE notes that counsel for UNOCAL stated at the hearing on the motion to dismiss at the district court that UNOCAL would not, at the time of the settlement of the state lawsuit, "sign on to paperwork that characterized it as a penalty, because of the punitive and bad conduct implications that the general public takes from that term." CBE, appropriately, in the Court's view, argues that UNOCAL simply "cannot have it both ways" and that the fairest characterization of the $780,000 payment is that it was not a penalty but, instead, the price of avoiding the stigma of a formal enforcement action.

Second, CBE argues that there are other significant advantages that were obtained by UNOCAL by making a payment independent of the state statutory provision, California Water Act § 13385, that is analogous to the administrative penalty provision of the Clean Water Act, 33 U.S.C. § 1319(g). California Water Code § 13385 sets out formal procedures to be followed and specific factors to be considered in setting a penalty. Thus, asserts CBE, by making a payment outside the context of § 13385, UNOCAL avoided a significant level of scrutiny as to the nature and amount of a penalty. For example, the United States, as *amicus curiae*, notes that there was no formal scrutiny of the economic benefits to UNOCAL of non-compliance and thus

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[2] The Appellees argue, however, that this cuts against the Appellant because § 13385 requires all penalties to be paid into the California Water Pollution Cleanup and Abatement Account.

no assurance that UNOCAL has fully disgorged the benefit it receives from violating effluent standards. CBE also notes that while payment of an administrative penalty must be made within 30 days of being imposed, California Water Code § 13323(d), UNOCAL was not required to make half of its payment until a year after the settlement was entered into.

The Court determines that the fairest characterization of the payment at issue is that it was, indeed, a settlement made to avoid an enforcement action by the Regional Board. Accordingly, because UNOCAL has not paid a "penalty," the § 1319(g)(6)(A)(iii) bar to citizen suits does not apply. This conclusion that § 1319(g)(6)(A)(iii) is not implicated is buttressed by the Court's interpretation of the term "comparable state law," discussed below.

**b. "comparable state law"**

Having determined that the payment at issue was not a "penalty," the district court also concluded that the payment was not "assessed under this subsection, or such comparable State law" within the meaning of § 1319(g)(6)(A)(iii). It is undisputed that the penalty provision in § 13385 of the California Water Code is comparable to the federal Clean Water Act penalty provision of 33 U.S.C. § 1319. It is also not disputed that the payment at issue in this case was not levied pursuant to California Water Code § 13385.[3] The key issue, therefore, is whether a penalty assessed not in accordance with § 13385 but, instead, under the aegis of a related provision of the California statutory scheme is "assessed under this subsection, or such comparable State law." UNOCAL argues, as it did in the district court, that although the CDO states that it was issued under the authority

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[3] Although the parties dispute the degree of similarity to the requirements of § 13385 of the procedures and factors that were actually taken and considered in this case, Appellant cedes that the specific requirements of § 13385 were not adhered to.

of California Water Code § 13301, because § 13301 is within the same statutory scheme as § 13385 a penalty assessed under the former provision is assessed under a "comparable State law" within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii).

The district court held that the "comparability assessment is conducted by examining the state statutory enforcement provision involved," here California Water Code § 13301, and "not the state statutory enforcement scheme as a whole." Because California Water Code § 13301 is not comparable to the federal penalty provision in 33 U.S.C. § 1319(g), reasoned the district court, a penalty assessed under § 13301 does not implicate the § 1319(g)(6)(A)(iii) bar on citizen suits. In reaching this conclusion the district court specifically rejected the reasoning of the First Circuit in *North and South Rivers Watershed Ass'n* v. *Scituate* interpreting the term "comparable" in § 1319(g)(6)(A)(ii). 949 F.2d 552, 555-556 (1st Cir. 1991).

In *Scituate* the First Circuit held that the comparability requirement of § 1319(g)(6)(A)(ii) is met where the state "statutory scheme" contains a penalty provision comparable to the federal penalty provision and that a state's decision not to utilize the comparable state law penalty provision in any particular case does not negate the "comparability" of the state action. *Id.*; accord, *Arkansas Wildlife Federation* v. *ICI Americas, Inc.*, 29 F.3d 376, 382-383 (8th Cir. 1994). The *Scituate* Court reasoned:

> The State's decision not to utilize the penalty provisions does not alter the comparability of the State Act's statutory scheme to the scheme found in the Federal Act. While the specific statutory section under which the State issued its Order does not, itself, contain a penalty provision, another section of the same statute does contain penalty provisions. These two coordinate parts are cogs in the same statutory scheme implemented by the State for the protection of its waterways.

*Scituate*, 949 F.2d at 556, (internal citations omitted). Thus, "[i]t is enough that the [state] statutory scheme ... contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals." *Id.* Furthermore, according to the *Scituate* Court, "[s]o long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable to those found in the Federal Act." *Id.*

In *Washington Public Interest Research Group* v. *Pendleton Woolen Mills* this Court interpreted the terms of 33 U.S.C. § 1319(g)(6)(A)(i). 11 F.3d 883 (9th Cir.1993). The Court noted that § 1319(g) deals only with administrative penalty actions. *Id.* at 885. The Court then concluded that when determining whether the EPA was "diligently prosecuting an action under this subsection," the phrase "under this subsection" could mean only that the EPA was prosecuting an administrative penalty action. *Id.* at 886. The § 1319(g)(6)(A)(i) bar to citizen suits, therefore, was not implicated "in the face of an administrative compliance order." *Id.* The Court specifically noted that it was not persuaded by the reasoning underlying the *Scituate* Court's interpretation of § 1319(g)(6)(A)(ii) which was grounded in that court's concern that the discretion of enforcement authorities to choose enforcement methods be preserved. *Id.* This Court noted the language of the statute was clear and that there was no evidence in the legislative history that suggested that Congress intended to extend the bar on citizen suits to a context beyond administrative penalty actions. *Id.* at 885-886. This Court also noted that had Congress intended that administrative compliance orders preclude citizen suits, it could have done so—as it has in other instances. *Id.* at 886.

The Court concludes that the requirement in § 1319(g)(6)(A)(iii) that any penalty be "assessed under this subsection, or such comparable State law" before it precludes citizen suits means that the penalty at issue must have been assessed under that provision of state law that is comparable to § 1319(g). There are several reasons for this conclusion. First, this is the plainest reading of the statutory language.[4] Second, § 1319(g) mandates various public notice and comment procedures as well as penalty assessment factors. Unless any penalty is assessed according to the particular provision of state law that is comparable to § 1319(g), there is no guarantee that the public will be given the requisite opportunity to participate or that the penalty assessed is of the proper magnitude. Third, as noted by the United States in its amicus brief, the holding of *Scituate* leads to the anomalous conclusion that state administrative enforcement actions would more broadly preclude citizen suits than the administrative enforcement actions of the EPA. Nothing in the language and structure of the § 1319(g)(6)(A) in any way suggests that Congress intended such a dichotomy. Nor has the UNOCAL pointed to any legislative history that would indicate that Congress intended that state administrative actions be given

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[4] As the Supreme Court has stated, "the starting point for interpreting a statute is the language of the statute itself." *Gwaltney*, 484 U.S. at 56, 108 S.Ct. at 381, quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *GTE Sylvania, Inc.*, 447 U.S. at 108, 100 S.Ct. at 2056. "If the intent of Congress is clear, that is the end of the matter; for the court ... must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

broader preclusive effect than the administrative actions of the EPA.

**2. Applicability of § 1319(g)(6)(A)(ii)**

§ 1319(g)(6)(A)(ii) precludes this citizen suit if the State "has commenced and is diligently prosecuting an action under a State law comparable to this subsection."

The district court concluded that the § 1319(g)(6)(A)(ii) bar was inapplicable for two reasons. First, the district court concluded that the action at issue was not taken "under a State law comparable to this subsection." Additionally, the district court concluded that "because of the entry of the settlement agreement and the CDO, the Regional Board's enforcement action is no longer still being 'prosecuted' within the meaning of § 1319(g)(6)(A)(ii)."

UNOCAL has made no contention in its briefs as to why the district court erred in concluding that the action was no longer being "prosecuted" within the meaning of § 1319(g)(6)(A)(ii).[5] It seems plain that no action *is* being prosecuted at this time. Thus, § 1319(g)(6)(A)(ii) is inapplicable. Furthermore, the Court concludes, for the reasons discussed above with respect to § 1319(g)(6)(A)(ii), that the district court did not err in concluding that the Regional Board's action was not taken "under a State law comparable to this subsection."

**B. Did the Regional Board's Cease and Desist Order Effectively Defer the Compliance Date for Selenium Discharges so that UNOCAL is not "in Violation" of an Effluent Standard or Limitation?**

UNOCAL asserts that CBE has failed to state a claim because the facts it alleges do not constitute a "violation of an

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[5] Indeed, the Appellant raised this provision in the district court only in a footnote of its briefs and it was dealt with by the district court in a footnote to its decision.

effluent standard or limitation" within the meaning of § 1365(a)(1)(A) because the CDO issued by the Regional Board had the effect of modifying UNOCAL's NPDES permit to extend until 1998 the deadline for complying with the final selenium limit.

33 U.S.C. § 1365 generally authorizes private citizens to sue those violating, among other things, "an effluent standard or limitation" under the Clean Water Act.[6] "Effluent standard or limitation" means "an effluent limitation or other limitation under section 1311" or "a permit or conditions thereof issued under section 1342 [the NPDES provision] of this title." 33 U.S.C. § 1365(f). Thus, violation of the limits specified in an NPDES permit is a violation of "an effluent standard or limitation" within the meaning of § 1365.

The district court concluded that the issuance by the Regional Board of the CDO extending the compliance schedule was akin to an exercise of prosecutorial discretion and did not suspend the limits and deadlines contained in the NPDES permit or shield UNOCAL from this citizen suit. While UNOCAL concedes that the CDO did not purport to modify the NPDES permit and did not constitute a formal

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[6] Section 1365 provides, in part, that:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—
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> > (1) against any person ... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator [of the EPA] or a State with respect to such a standard or limitation....

33 U.S.C. § 1365.

amendment or modification of the NPDES permit,[7] it argues that the CDO did have the practical effect of modifying the compliance date contained in the NPDES permit. For the first time on appeal, UNOCAL also argues that the district court was foreclosed, under either the doctrine of exhaustion of remedies or the doctrine of *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), from addressing the argument that the CDO issued by the Regional Board failed to effectively modify the NPDES compliance date because California law provided CBE a right, of which they did not avail themselves, to review of the CDO by appeal to the state water board or by judicial review in state court. California Water Code §§ 13320, 13330.

The Court concludes that the federal courts are not precluded from addressing the issue of whether the CDO effectively modified the NPDES compliance date. While it is true that there, were procedures available for CBE to appeal the CDO within the state system, this action does not challenge the validity of the CDO but rather seeks to enforce the requirements of the Clean Water Act. Furthermore, 33 U.S.C. § 1365 makes no mention of exhaustion of state remedies as a prerequisite for bringing a citizen suit. Similarly, *Younger* abstention is not appropriate. There are three requirements for the invocation of *Younger*—ongoing state proceedings, implication of an important state interest in the state proceedings, and an adequate opportunity to raise federal questions in the proceedings. *World Famous Drinking Emporium* v. *City of Tempe*, 820 F.2d 1079 (9th Cir. 1987). While failure to exhaust state appellate remedies may satisfy the requirement that there be ongoing state proceedings, *Id.*,

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[7] There are specific, mandatory procedure for NPDES permit modification. Cal. Code Regs. Tit. 23, § 2235; 40 C.F.R. § 122.62. *See also Ackels* v. *U.S.E.P.A.*, 7 F.3d 862, 864, n.1 (9th Cir. 1993). It is undisputed that these procedures were not followed in this case.

the doctrine is simply not relevant where the federal action is not seeking a ruling on the validity of the state action.

The Court further concludes that the CDO at issue did not modify, effectively or otherwise, the terms of UNOCAL's NPDES permit. This conclusion is appropriate for the following reasons.

First, the CDO does not purport to modify the NPDES permit. In the Findings to the CDO, the Regional Board states in paragraph 4 that "[t]he effluent limitations imposed under Order No. 91-026 [amending the NPDES permit to include the final selenium limits] become effective on December 12, 1993.... The Regional Board is adopting this Order to enforce the provisions of Order No. 91-026." Thus, the Regional Board did not intend to modify the Permit but instead worked out a compliance schedule wherein, according to paragraph 7 of the CDO, if "the dischargers have failed to comply with the provisions of this Order [the official may ...] request the Attorney General to take appropriate action against the dischargers, including injunctive and civil remedies, if appropriate, or to issue a Complaint for Board consideration of Administrative Civil Liabilities." Thus, the language of the CDO itself fits with the conclusion that the CDO was an exercise of prosecutorial discretion.

Second, as noted above, federal and state regulations govern the modification of NPDES permits. It is not disputed that these regulations were not followed in this case. These regulations, both procedural and substantive, ensure that the standards embodied in an NPDES permit cannot be evaded with the cooperation of compliant state regulatory authorities. For instance, there are public notice requirements for a permit modification process that are different than those required in an enforcement action. Further, there is a five year duration on the life of an NPDES permit that the "effective modification" asserted here would violate. § 1342(b)(1)(B).

Third, even if the CDO were to be construed as having effectively extended the compliance date in the NPDES permit, such a modification would likely run afoul of the substantive constraint on the ability of regulators to modify permits found in 33 U.S.C. § 1342(o) (the "anti-backsliding" provision). This provision prohibits, with certain narrow exceptions,[8] any modified permit from containing "effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." UNOCAL asserts that the "effective" modification of the permit under consideration would not violate the anti-backsliding provision because the permit contained interim limits which would remain in full effect until the final limits actually took effect. Essentially, argues UNOCAL, the final limits have never taken effect so they cannot be backslided on. This argument seems to assume that effluent standards are not effectively part of the NPDES permit until they take effect. It appears to the Court, however, that a modified NPDES permit that does not contain a strict effluent limitation that had been about to come into effect is, indeed, "less stringent" than the previous, unmodified NPDES permit—regardless of whether the limitation had yet taken effect.

## III.

For the foregoing reasons, the district court's denial of UNOCAL's motion to dismiss is **AFFIRMED**.

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[8] Appellant has asserted that two such exceptions are applicable. Appellant asserts that "new information is available" that "would have justified" a less stringent standard under § 1342(o)(2)(B)(i) and that there is no "reasonably available remedy" under § 1342(o)(2)(C). Because it is not necessary so to do, the Court does not comment on the applicability of these exceptions.

## APPENDIX B

CITIZENS FOR A BETTER ENVIRONMENT-CALIFORNIA, et al., Plaintiffs,

v.

UNION OIL COMPANY OF CALIFORNIA, Defendant.

CITIZENS FOR A BETTER ENVIRONMENT-CALIFORNIA, et al., Plaintiffs,

v.

EXXON COMPANY USA, Defendant.

Nos. C 94-0712 TEH, C 94-0713 TEH.

United States District Court, N.D. California.

July 8, 1994.

### MEMORANDUM OPINION AND ORDER

THELTON E. HENDERSON, Chief Judge.

The two above-captioned related cases are identical citizen suits brought by non-governmental environmental conservation organizations against defendant oil companies. The suits challenge each defendant's discharge into portions of the San Francisco Bay of waste water containing the chemical selenium from oil refineries owned by each defendant located in the San Francisco Bay area. The first suit is brought against defendant Union Oil Company of California ("Unocal") and concerns Unocal's refinery at Rodeo, California, which discharges waste water containing selenium into the San Pablo Bay. The second is against the Exxon Corporation ("Exxon") and concerns Exxon's refinery at Benicia, California, which discharges selenium into Suisan Bay. Plaintiffs allege that the selenium levels in the effluent

discharged from Unocal and Exxon's refineries violate the federal Water Pollution Control Act ("Clean Water Act" or "Act"), 33 U.S.C. § 1251 *et seq.*

Defendants Unocal and Exxon have moved to dismiss the suits on several grounds. In addition, Exxon has moved that the suit against it be dismissed on the ground that venue over that case properly lies in the U.S. District Court for the Eastern District of California. Oral argument on these motions was heard by the Court on June 6, 1994. After consideration of the parties' written and oral arguments, the Court rules that venue in the suit against Exxon, *Citizens for a Better Environment-California* v. *Exxon*, No. C 94-0713 TEH, indeed lies in the Eastern District and therefore ORDERS that the case be TRANSFERRED from this Court to the U.S. District Court for the Eastern District of California. As for the suit against Unocal, the Court DENIES Unocal's motion to dismiss. The reasons for these rulings are set forth in the memorandum opinion and order that follows.

## I. BACKGROUND

In these two actions brought pursuant to the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, the plaintiff environmental groups seek to enforce effluent discharge standards and deadlines contained in certain pollution permits issued to defendants Unocal and Exxon pursuant to the Clean Water Act. These suits are undertaken in the face of an administrative order, issued by a state agency charged with enforcing the Clean Water Act, which purports to grant defendants a five-year extension of the deadline by which they must come into compliance with the pollution discharge standards contained in their permits. The issue central to these motions is what effect the state administrative order has on the enforceability of the standards contained in defendants' pollution permits.

## A. THE REGULATORY FRAME-WORK

The Clean Water Act regulates the discharge of pollutants into navigable waters. The statute is structured such that all discharge of pollutants is prohibited except insofar as one of several enumerated statutory exceptions applies. *See* 33 U.S.C. § 1311(a). One such exception obtains where a polluter has been issued a permit pursuant to the National Pollution Discharge Elimination System ("NPDES permit" or "permit"), authorizing it to discharge designated pollutants at certain levels subject to certain conditions. *See* 33 U.S.C. § 1342. The effluent discharge standards or limitations specified in an NPDES permit define the scope of the authorized exception to the 33 U.S.C. § 1311(a) prohibition, such that violation of a permit limit places a polluter in violation of 33 U.S.C. § 1311(a). Private parties may bring citizen suits pursuant to 33 U.S.C. § 1365 to enforce effluent standards or limitations, which are defined as including violations of 33 U.S.C. § 1311(a). 33 U.S.C. § 1365(f)(1).

The Act provides that, in any given state or region, authority to administer the NPDES permitting system can be delegated by the federal Environmental Protection Agency ("EPA") to a state or regional regulatory agency, provided that the applicable state or regional regulatory scheme under which the local agency operates satisfies certain criteria. *See* 33 U.S.C. § 1342(b). In California, EPA has granted authorization to a state regulatory apparatus, comprised of the State Water Resources Control Board ("State Board") and several subsidiary Regional Water Quality Control Boards, to issue NPDES permits. The entity responsible for issuing NPDES permits and otherwise regulating discharges in the region at issue in these cases is the California Regional Water Quality Control Board, San Francisco Region ("Regional Board" or "Board").

## B. HISTORY OF UNOCAL AND EXXON'S NPDES PERMITS

Exercising its delegated authority under the Clean Water Act, the Regional Board in 1989 and 1990 issued NPDES permits for Unocal, Exxon, and four other Bay Area oil refineries, specifying certain limits on the amount of pollutants that the refineries could discharge into the San Francisco Bay and its estuary ("Bay"). Selenium, a toxic element, occurs in high concentrations in the relatively low grade crude oil from the San Joaquin Valley that is refined at the six Bay Area refineries. Selenium passes through the refineries and is present in the wastes that they discharge into the Bay.

The 1987 Amendments to the Clean Water Act required states to identify a list of navigable waters for which water quality standards established under the Act were unlikely to be achieved "due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to [33 U.S.C. § 1317(a)]." 33 U.S.C. § 1314(*l*)(1)(B). Selenium has been listed by EPA as a toxic pollutant pursuant to this code section. *See* 40 C.F.R. § 401.15. As part of such listing, the state must identify the point sources causing selenium pollution in the listed waters and develop an "individual control strategy" ("ICS") to control each point source so as to achieve the water quality objectives for such waters "as soon as possible, but not later than 3 years after the date of the establishment of such strategy." 33 U.S.C. §§ 1314(*l*)(1)(C), (D).

On February 3, 1989, when the California Water Resources Control Board published its list required pursuant to the 1987 Clean Water Act Amendments, the State Board did not identify several portions of the upper San Francisco Bay Estuary—San Pablo Bay, Carquinez Strait, and Suisan Bay—as "toxic hot spots" for selenium, nor did it specify oil refinery selenium discharges as a substantial cause of selenium pollution in the Bay. EPA took issue with these

omissions, among other things. Exercising its regulatory authority under the Clean Water Act, EPA issued a final listing on September 28, 1990, designating these portions of the Bay as "impaired waters" due to selenium pollution, and attributing that selenium substantially to the discharges from the six Bay Area refineries: Unocal's refinery in Rodeo, Exxon's refinery in Benicia, Shell Oil Company's manufacturing complex in Martinez, Tosco Corporation's refinery in Avon, Chevron U.S.A.'s refinery in Richmond, and Pacific Refining Company's facility in Hercules. EPA stated that it disapproved of the ICS's then in effect for Unocal, Exxon, and the other dischargers, and made known its intention to issue its own ICS's not later than December 31, 1990, which would require compliance with specified effluent limits, calculated based on state water quality standards, within three years of the date of issuance.

Responding to EPA's rebuke, on February 20, 1991, the Board issued an order listing San Pablo Bay, Carquinez Strait, and Suisan Bay as "hot spots" under 33 U.S.C. § 1314(*l*), and amending Unocal, Exxon, and the other refineries' NPDES permits to specify certain concentration- and mass-based limits on the amount of selenium that each refinery could discharge. By the terms of the amended permits, these new limits ("final limits") would become effective on December 12, 1993. On June 16, 1991, the Board issued an additional order, amending the permits of Unocal, Exxon, and the other refineries to include interim selenium discharge limits ("interim limits"), significantly less stringent than the final limits. The interim limits went into effect immediately on that date and were to remain in force until the final limits took effect.

## C. STATE COURT LAWSUIT BY REFINERIES

Unocal, Exxon, and the other Bay Area refineries sought unsuccessfully to challenge the Regional Board's listing of San Pablo Bay, Carquinez Strait, and Suisan Bay as impaired waters, each filing applications for review with the State

Water Resources Control Board. On October 16, 1992, shortly after those applications were dismissed by the State Board, the Bay Area refineries and their trade association, the Western States Petroleum Association ("WSPA"), filed a petition for writ of mandate in Solano County Superior Court seeking to set aside the Regional Board's orders imposing the final limits and the interim limits on the ground that the listing of the above-noted regions of the Bay as impaired bodies of water was in violation of various provisions of the Clean Water Act and of EPA administrative regulations promulgated under the Act.

## D. SETTLEMENT OF LAWSUIT AND REGIONAL BOARD ENFORCEMENT ACTION

The refineries and WSPA did not press for a hearing on the merits of their state court suit but instead initiated settlement negotiations with the Regional Board and the California Attorney General's Office, which proceeded over the course of 1993. Three of the Bay Area refineries, Chevron, Tosco, and Pacific Refining, reduced their discharge levels, such that they would be in compliance with the final limits when they took effect. Unocal, Exxon, and Shell, however, contended that they could not comply with the final limits. Although the other three refineries had succeeded in reducing their effluent levels to meet the final limits, Unocal, Exxon, and Shell maintained that, due to technological constraints, they could not reduce their selenium discharge levels sufficiently to comply with the final limits scheduled to take effect on December 12, 1993.

On November 8, 1993, the six refineries, the state, and the Regional Board agreed on a settlement pursuant to which the refineries and WSPA would consent to dismissal of their state court action, and the Board would issue a Cease and Desist Order ("CDO"). The Board published the proposed settlement and CDO in the days that followed, and noticed public hearings on them.

The principal terms of the settlement were that the three refineries that had not complied with their final selenium limits—Unocal, Exxon, and Shell—would receive a nearly five year extension until July 31, 1998 of their deadline for complying with their final limits, and in exchange would pay the state $2 million and, along with the other refineries, would drop their state court action. Oddly, however, neither the settlement agreement nor the CDO expressly state that Unocal, Exxon, and Shell are relieved from having to comply with the final limits contained in their NPDES permits until July 31, 1998. Rather, the CDO effects this purported extension by providing that Unocal, Exxon, and Shell

> shall cease and desist from discharging waste in violation of [their NPDES permits] by complying with the following:
>
> * * * * * *
>
> 3. Compliance with this Order shall be in accordance with the following tasks and time schedules:
>
> * * * * * *
>
> c. The dischargers shall implement a removal technology or technologies, or an alternate control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge limitations as specified in [the NPDES permits] and shall comply with these limits, no later than July 31, 1998.

CDO at 7. The settlement agreement stated that the above-quoted provision of the CDO "effectively modified" the deadlines specified in defendants' NPDES permits for complying with the final selenium limits. The CDO also provided that Unocal, Exxon, and Shell would implement a study to identify technologies for reducing selenium discharge levels, and would carry out pilot tests and source reduction studies.

The terms of the settlement agreement dismissing the refineries' state court suit specified that the dismissal was to be "without prejudice" and expressly provided that nothing in the agreement waived the refineries' right to challenge the validity of the final limits contained in their NPDES permits. The refineries agreed only to refrain from challenging the final limits unless and until the refineries should find in 1998 that they are unable to identify or implement a workable removal technology or other control strategy that would enable them to meet the limits, and the Board declines to extend the July 31, 1998 deadline further. Thus, in effect, the refineries merely agreed to drop their challenge to the final limits so long as the limits are not being enforced, but retained the right to challenge them once they are.

On November 19, 1993, and December 15, 1993, public hearings on the CDO were held at which the instant plaintiffs and other members of the public testified. The Board made some minor modifications to the CDO in response to comments received from the public and from EPA, and issued a final CDO on January 19, 1994. Plaintiffs filed these lawsuits on March 2, 1994.

## II. LEGAL STANDARD

Dismissal is appropriate under Fed. R. Civ. P. ("Rule") 12(b)(6) when a plaintiff's complaint fails to state a claim upon which relief can be granted. The Court must accept as true the factual allegations of the complaint and indulge all reasonable inferences to be drawn from them, construing the complaint in the light most favorable to the plaintiff. *Dodd* v. *Spokane County*, 393 F.2d 330, 334 (9th Cir. 1968); *NL Industries, Inc.* v. *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Unless the Court converts the Rule 12(b)(6) motion into a motion for summary judgment, the court may not consider material outside of the complaint. *Powe* v. *City of Chicago*, 664 F.2d 639, 642 (7th Cir. 1981). However, "on a motion to dismiss a court may properly look beyond the complaint to matters of public record and doing so does not

convert a Rule 12(b)(6) motion to one for summary judgment." *Mack* v. *South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Matters of public record include court and agency orders and agency regulations. *Id.* Thus, this Court may take judicial notice on this motion of rulings and regulations issued or published by the Regional Board or by EPA, regardless whether such documents were filed as attachments to the complaint.

The Court must construe the complaint liberally, and dismissal should not be granted unless "it appears to a certainty that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Intake Water Co.* v. *Yellowstone River Compact Comm'n*, 769 F.2d 568, 569 (9th Cir. 1985), *cert. denied*, 476 U.S. 1163, 106 S. Ct. 2288, 90 L.Ed.2d 729 (1986). However, legal issues on which the actionability of the claim depends can and should be resolved at this stage. Dismissal is appropriate if, as a consequence of such resolution, the court determines that, as a matter of law, the complaint's allegations fail to state a claim.

Dismissal is appropriate under Rule 12(b)(3) where venue in a case does not properly lie in the court in which it is filed. However, where the court deems it to be "in the interest of justice," the court may instead transfer an improperly venued case to a court in which it could have been brought. 28 U.S.C. § 1406(a).

## III. DISCUSSION

In their complaints in each of these two related cases, plaintiffs allege three causes of action: that defendant has not complied with an applicable effluent standard or limitation—to wit, the final selenium limits and accompanying compliance deadline contained in their NPDES permits—in violation of the Clean Water Act, 33 U.S.C. § 1311(a); that defendant has not complied with an applicable water quality standard, also in violation of the Clean Water Act; and that defendant has

engaged in an unfair business practice in violation of California Business & Professions Code § 17200 *et seq.*

As to the first cause of action, defendants contend that the CDO issued by the Regional Board properly extended the deadline by which defendants are required to comply with the selenium discharge limits specified in their NPDES permits, such that their present failure to meet that limit does not violate the federal Clean Water Act. Alternatively, defendants argue that, in any event, plaintiffs may not bring a citizen suit to enforce the effluent standards specified in defendants' NPDES permits because the Regional Board has already taken enforcement action as to that violation and defendants have paid a penalty, thereby precluding a parallel citizen enforcement suit under 33 U.S.C. § 1319(g)(6)(A)(iii). Finally, defendants charge that plaintiffs' suits are barred for failure to satisfy the notice requirements imposed under 33 U.S.C. § 1365(b)(1)(A) for citizen suits.

As to the second cause of action, defendants urge that water quality standards—as distinct from effluent standards—are not enforceable in citizen suits under the Clean Water Act and that the count must consequently be dismissed. As for the third cause of action, defendants contend that dismissal of the first two claims necessitates dismissal of the third state law claim as well. Finally, defendant Exxon charges that the suit against it must be dismissed for improper venue since its refinery is not located within the geographic area for which venue properly lies in this Court.

## A. VENUE IN *CITIZENS FOR A BETTER ENVIRONMENT V. EXXON*

The citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, under which plaintiffs have brought these suits, contains a special venue provision stating that

> Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought

> under this section *only* in the judicial district in which such source is located.

33 U.S.C. § 1365(c)(1) (emphasis added). As is clear on the face of the complaint, Exxon's refinery is located in the City of Benicia, *see* Complaint ¶ 9, which is within the County of Solano. Solano County is in the geographic region covered by the U.S. District Court for the Eastern District of California, not this Court. 28 U.S.C. § 84(b). The Eastern District is therefore the only district in which venue is proper under the Act. On this basis, Exxon urges that the Court dismiss the suit for improper venue pursuant to Rule 12(b)(1). Conceding this venue error in their opposition papers, plaintiffs urge that the Court transfer the case to the Eastern District rather than dismiss it.

28 U.S.C. § 1406(a) instructs that:

> The district court of a district in which is filed a case laying venue in the wrong ... district shall dismiss, or if it be in the interest of justice, transfer such case to any district ... in which it could have been brought.

Whether the interest of justice militates in favor of transfer rather than dismissal is a judgment committed to the sound discretion of the district court. "[T]ransfer is generally ... consistent with the 'interest of justice' ... because it eliminates the delay and additional expense associated with reinstituting suit in another forum." *Banque de la Mediterranee-France, S.A.* v. *Thergen, Inc.*, 780 F.Supp. 92, 95 (D.R.I. 1992). On the facts of this case, the Court holds that transfer rather than dismissal is appropriate. Accordingly, it is hereby ordered that *Citizens for a Better Environment-California* v. *Exxon*, No. C 94-0713 TEH, shall be TRANSFERRED FORTHWITH from this Court to the U.S. District Court for the Eastern District of California. In view of this ruling, the remainder of this opinion and order shall address only the motion to dismiss filed by the defendant in the Unocal case.

## B. FIRST CAUSE OF ACTION: VIOLATION OF EFFLUENT STANDARD OR LIMITATION

Under the Clean Water Act, dischargers are strictly liable for any violation of the terms of an NPDES permit. *California Public Interest Research Group* v. *Shell*, 840 F. Supp. 712, 714 (N.D. Cal. 1993). As explained above, the Act authorizes private parties to bring citizen suit enforcement actions, and provides, in pertinent part, that such actions may be brought against

> any person ... who is alleged to be in violation of ... an effluent standard or limitation under [the Act].

33 U.S.C. § 1365. *See* 33 U.S.C. § 1365(f) (defining "effluent standard or limitation"). As noted above, the definition of "effluent standard[s] or limitation[s]" for which violations are actionable under this section includes effluent standards or limits prescribed in NPDES permits, since violation of such limits places a polluter in violation of 33 U.S.C. § 1311(a). Additionally, violations of terms contained in NPDES permits are generally enforceable of their own accord in citizen suits. *See* 33 U.S.C. § 1365(f)(6).

There is no dispute that on December 12, 1993—the date the final selenium limits took effect under Unocal's NPDES permit—and every day since then, Unocal's discharges of selenium have exceeded the daily limits under its NPDES permit. Rather, Unocal contends that plaintiffs' citizen suit should be dismissed on the grounds: (1) that the CDO issued by the Regional Board properly extended the deadline by which defendant is required to comply with the final selenium discharge limits specified in its NPDES permit, such that the deadline specified in its permit is no longer in effect; (2) that, in any event, the citizen suit is barred under 33 U.S.C. § 1319(g)(6)(A)(iii) because the state agency charged with enforcing the Act, acting pursuant to a "comparable" state law, has already issued a "final order" regarding the

violation, assessing a "penalty" against Unocal which Unocal has paid; and (3) that plaintiffs have failed to satisfy the notice requirements for a citizen suit. Each of these objections, if correct, would provide an independently adequate basis for dismissing plaintiffs' suit. Thus, in order to avoid dismissal, plaintiffs must establish that none of these objections is well-founded.

**1. WHETHER, ON THE MERITS, THERE IS NO VIOLATION OF UNOCAL'S NPDES PERMIT BECAUSE THE REGIONAL BOARD'S CDO VALIDLY EXTENDED THE COMPLIANCE DEADLINE CONTAINED IN UNOCAL'S PERMIT**

Unocal's first argument for dismissing plaintiffs' claim under the Clean Water Act seeking to enforce compliance with an effluent standard or limitation—plaintiffs' first cause of action—is that, on the merits, Unocal has not violated its NPDES permit because the CDO issued by the Regional Board validly extended until 1998 the deadline for complying with the final selenium limit specified in the NPDES permit.[1]

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[1] Unocal labels this argument a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), reasoning that if the NPDES limits are effectively suspended such that Unocal has not violated an effluent limit, then this Court lacks subject matter jurisdiction, for 33 U.S.C. § 1365(a) confers jurisdiction over citizen suits against polluters only where violations of effluent standards or other orders exist. However, the Supreme Court has held that, generally, assertion of a claim under a federal statute "alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the [statute] does provide the claimed rights." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359, 79 S.Ct. 468, 473, 3 L.Ed.2d 368 (1959). In such cases, a finding of no statutory violation results in dismissal for failure to state

(continued...)

As recounted above, pursuant to the settlement reached by the Regional Board, the State Attorney General's Office, and the Bay Area oil refineries in late 1993, the Regional Board issued a CDO containing several terms that had been agreed to in the settlement. The CDO provided, in pertinent part:

> IT IS HEREBY ORDERED, pursuant to Section 13301 of the California Water Code, that Shell Oil Company, Union Oil Company of California, and Exxon Company, U.S.A. shall cease and desist from discharging waste in violation of Order No. 91-026 [—the order amending the refineries' NPDES permits to impose final selenium discharge limits—] by complying with the following:
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> * * * * * *
>
> 3. Compliance with this Order shall be in accordance with the following tasks and time schedules:
>
> * * * * * *
>
> c. The dischargers shall implement a removal technology or technologies, or an alternate control strategy, which has been determined by the dischargers to be capable of achieving compliance with the discharge limits specified in Order No. 91-026 and shall comply with these limits, no later than July 31, 1998.

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[1] (...continued)
a claim rather than for lack of jurisdiction. The Court will therefore treat Unocal's argument here as a motion to dismiss for failure to state a claim. Ultimately, however, the label affixed to the motion is unimportant. Regardless whether dismissal on such grounds is correctly characterized as based on absence of jurisdiction or failure to state a claim, in both cases it hinges on the same legal question: whether the Board's action, as a matter of law, suspended the final limits and deadline contained in Unocal's NPDES permit.

CDO at 7.

Unocal concedes both (1) that the CDO did not purport to modify Unocal's NPDES permit, and (2) that even if it did purport to do so, such a modification would not have been valid. Any such putative modification would have been invalid for three reasons. First, modifications to NPDES permits must be implemented in accordance with standards and procedures specified in federal agency regulations which were not followed here.[2] Second, even if a purported modification had been procedurally proper, it would have

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[2] The procedures for NPDES permit modification are mandatory. Cal. Code Regs. tit. 23, § 2235; 40 C.F.R. § 123.25(a)(22); *Ackels* v. *U.S. E.P.A.*, 7 F.3d 862, 864 n.1 (9th Cir. 1993); *United States* v. *Metropolitan District Commission*, 16 Envtl. L. Rep. 20621, 20624, 1985 WL 9071 (D. Mass. 1985). Unless properly modified in accordance with these procedures, the permit as originally issued remains in effect, and violations of the permit may be subject to a citizen enforcement suit. *Public Interest Research Group* v. *Yates Industries*, 757 F.Supp. 438, 445 (D.N.J.1991); *Metropolitan District Commission*, 16 Envtl. L. Rep. at 20624, 1985 WL 9071.

First, the enforcement agency modifying the permit must make a finding of cause appropriate for modifying the permit. 40 C.F.R. §§ 122.41(f), 122.62, 122.63. The Regional Board made no such finding in this case. Second, the enforcement agency must prepare a draft permit and issue a fact sheet setting forth the significant factual, legal, methodological, and policy questions considered in preparing the draft permit, or take other mandatory steps to ensure careful assessment of alternatives. 40 C.F.R. §§ 124.6, 124.8(a), 124.10, 124.11, 124.12, 124.56. The Regional Board did not follow these procedures in this case. Furthermore, the Board's notice of hearing on the CDO makes no reference to a permit modification, further indicating that the Board did not purport to be modifying the refineries' permits.

violated a substantive requirement of the 1987 Clean Water Act Amendments which establish a three-year deadline for a polluter's coming into compliance with water quality standards imposed pursuant to 33 U.S.C. § 1314(*l*)(1)(D), such as those contained in Unocal's NPDES permit.[3] The three-year deadline for Unocal and the other refineries' permits was triggered, at the very latest, on February 20, 1991, when the Board issued its order amending the NPDES permits to include the final selenium limits. In light of that fact, any ruling purporting to extend the compliance deadline beyond February 20, 1994 would violate the statutory three-year deadline. Third, any purported modification to Unocal's permit would have violated another substantive requirement of the 1987 Clean Water Act Amendments, the "anti-backsliding" provision, which forbids permits of the type held by Unocal from being "renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit," subject to certain exceptions. 33 U.S.C. § 1342(o)(1).[4]

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[3] As discussed above, 33 U.S.C. § 1314(*l*)(1)(D) requires that individual control strategies (ICS's) be adopted in order to achieve reduction in pollution levels in certain waters designated pursuant to 33 U.S.C. § 1314(*l*)(1)(D). An ICS must impose limits on toxic pollutants sufficient to attain water quality standards within three years. 33 U.S.C. § 1314(*l*)(1)(D); 40 C.F.R. § 123.46; *Westvaco Corp.* v. *U.S. E.P.A.*, 899 F.2d 1383, 1385 (4th Cir. 1990). To that end, Unocal's NPDES permit compelled it to reduce selenium discharges to meet certain limits by December 12, 1993, which was within three years of the February 20, 1991 issuance of the Board's order amending the permit to impose the final selenium limits.

[4] In the case of effluent limitations established on the basis of section 1311(b)(1)(C) of this title or section 1313(d) or (e)

(continued...)

Rather than contending that its permit was "modified" by the CDO, Unocal argues instead that a deadline for complying with effluent standards specified in an NPDES permit may permissibly be extended through an administrative enforcement order issued by the state agency that issued the permit. Unocal makes the novel argument that though such an enforcement action cannot "modify" a permit, an extension granted under such an order constitutes a valid authorization that has the legal effect of suspending the effect of the permit requirements such that a polluter is shielded from citizen suits seeking to enforce compliance with the permit's original deadline and limits.

It is clear that California law authorizes Regional Boards to issue CDO's that purport to grant polluters an extended time schedule within which to come into compliance with discharge limits. *See* Cal. Water Code § 13301.[5] However,

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[4] (...continued)
of the title [all concerning water quality standards], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit....

33 U.S.C. § 1342(o)(1). *See New Jersey Public Interest Research Group* v. *New Jersey Expressway Auth.*, 822 F.Supp. 174, 185 (D.N.J. 1992).

[5] When a regional board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions (a) comply forthwith, (b) comply in accordance with a time schedule set by the board, or (c) in the event of a threatened violation, take appropriate remedial or (continued...)

Unocal can point to no case where a federal court has held that a state enforcement action that does not satisfy the requirements to qualify as a valid "modification" of an effluent standard or limit contained in an NPDES permit, can nonetheless suspend the permit limit, shielding the polluter from having the terms of the permit enforced against it through a citizen suit.[6] Indeed, the only analogous case cited by the parties indicates the opposite. That case, *United States* v. *Bedford*, 1987 U.S.Dist. LEXIS 16103 (N.D. Ohio 1987), *adopted*, 1988 U.S. Dist. LEXIS 18612 (N.D. Ohio 1988), held that a state enforcement action that purported to suspend the terms of an NPDES permit, but which did not qualify as a valid "modification" of the permit, did not prevent the federal government from bringing a civil enforcement action in federal court pursuant to 33 U.S.C. § 1319(b) to enforce the terms of the permit. 1987 U.S. Dist. LEXIS 16103, at *10-*12. 33 U.S.C. § 1319(b) authorizes the U.S. Attorney General to bring suit to enforce compliance with, *inter alia*, effluent limits imposed under NPDES permits. Since the instant citizen suit also seeks enforcement of permit limits,[7]

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[5] (...continued)
preventative action. ....

Cal. Water Code § 13301.

[6] Again, this argument by Unocal is distinct from its separate argument that, even if the final limits contained in Unocal's NPDES permit did, in theory, take effect on December 12, 1993, and are still in force today, enforcement of those limits through a citizen suit is precluded under 33 U.S.C. § 1319(g)(6)(A)(iii). That separate argument is addressed by the Court later in this opinion. *See infra* Part III.B.2.

[7] 33 U.S.C. § 1319(b), the enforcement provision involved in *Bedford*, authorizes the Attorney General to sue polluters who
(continued...)

Bedford is authority for the proposition that the Regional Board's CDO did not suspend the final limits and deadline contained in Unocal's NPDES permit such that those terms may not still be enforced against it.

Unocal attempts to draw support for its position from language found in *Sierra Club* v. *Colorado Refining Co.*, 838 F.Supp. 1428, 1436 (D. Colo. 1993). However, *Colorado Refining Co.* concerned only whether a state enforcement action erected a 33 U.S.C. § 1319(g)(6)(A) preclusive bar against a citizen suit, and expressed no opinion on Unocal's instant argument. Unocal's citations to *Northwest Environmental Advocates* v. *Portland*, 11 F.3d 900, 906-11 (9th Cir. 1993), and this Court's recent opinion in the related case of *California Public Interest Research Group* v. *Shell Oil Co.*, 840 F.Supp. 712 (N.D. Cal. 1993), are similarly inapposite. *Portland*, as discussed later in this opinion, involved entirely different issues. Similarly, the language quoted from *Shell* stating that "any challenge to effluent limits in an NPDES permit presents a matter for the Water Board, not this Court, to address," 840 F.Supp. at 712, concerns just

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[7] (...continued)
violate, *inter alia*, 33 U.S.C. § 1311(a). 33 U.S.C. §§ 319(a), (b). As noted above, violation of effluent limits imposed under an NPDES permit places a permit-holder in violation of 33 U.S.C. § 1311(a). *See* discussion *supra* Part I.A. As also noted above, citizen suits may be brought under 33 U.S.C. § 1365 for violations of, *inter alia*, 33 U.S.C. § 1311(a). 33 U.S.C. § 1365(f)(1). Thus, NPDES permit limits that are enforceable by the federal government under 33 U.S.C. § 1319(b) are also enforceable through citizen suits. The only exception to this proposition obtains where a citizen suit is precluded under 33 U.S.C. § 1319(g)(6)(A) by a pending or final state or federal enforcement action. This separate bar to citizen suits is discussed later in the opinion. *See infra* Part III.B.2.

what it says: the circumstances under which a discharger may bring suit in federal court to *challenge* limits contained in an NPDES permit promulgated by a state enforcement agency. *Shell* in no way addresses the entirely separate issue of citizen suits to *enforce* permit limits.

In its reply papers, Unocal also cites an administrative ruling issued by the Environmental Appeals Board of EPA, *In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5, 1990 NPDES LEXIS 4 (April 16, 1990), as supporting their argument that a non-modification can nonetheless excuse noncompliance with an NPDES permit. The language from *Star-Kist* cited by Unocal simply states that EPA has authority, under 33 U.S.C. § 1319(a), to issue compliance orders that extend the deadlines for polluters to come into compliance with their NPDES permit requirements. That proposition is non-controversial. *Star-Kist* does not address the subtly but significantly different issue of the effect of such extensions: whether EPA compliance orders extending NPDES permit deadlines suspend the effect of the permit requirements such that polluters are shielded against citizen suits seeking to enforce compliance with the permit limits. Nor does Star-Kist address the analogous issue that is presented on this motion: whether *state* compliance orders extending NPDES permit deadlines can suspend the effect of permits such that their terms may no longer be enforced through citizen suits.

At first blush, it may not appear obvious how to assemble the different component parts of the statutory scheme at issue here into a coherent whole. First, there exist the very stringent procedures and substantive rules limiting the circumstances under which enforcement agencies may "modify" the terms of NPDES permits. Second, there exists authorization for enforcement agencies to bring civil penalty actions, *see* 33 U.S.C. § 1319(g), pursuant to which compliance schedules may, *de facto*, be extended, since such actions preclude citizen suits to enforce the NPDES permits.

*See* 33 U.S.C. § 1319(g)(6)(A)(iii).[8] Third, there exists authorization for enforcement agencies to bring non-penalty civil compliance actions, *see* 33 U.S.C. § 1319(a),[9] pursuant to which compliance schedules may be extended, *Star-Kist*, 1990 NPDES LEXIS 4, at *21, but which nonetheless do *not* bar citizen suits to enforce the terms of the original NPDES permits. *Washington Public Interest Research Group* v. *Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993).

The element of the scheme the role of which may at first appear difficult to reconcile is the non-penalty civil compliance action. On the one hand, it is clear that such actions cannot amend NPDES permits to postpone compliance deadlines, *Star-Kist*, 1990 NPDES LEXIS 4, at *6, and do not trigger the statutory preclusive bar against citizen suit enforcement of limits contained in NPDES permits. *Pendleton*, 11 F.3d 883. On the other hand, however, it is also clear that EPA *can* authorize extended compliance schedules in the course of such compliance actions, *Star-Kist*, 1990 NPDES LEXIS 4, at *6, and that Regional Water Quality Control Boards can do the same under California law. Cal. Water Code § 13301. If such extended compliance schedules do not suspend the effect of limits and deadlines contained in NPDES permits such that the permit terms may

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[8] Although 33 U.S.C. § 1319(g) authorizes only *federal* civil penalty actions brought by EPA, 33 U.S.C. § 1319(g)(6)(A)(iii) provides that penalty actions brought by *state* agencies under comparable state laws trigger the same preclusive bar against citizen suits to enforce NPDES permits.

[9] Although 33 U.S.C. § 1319(a) authorizes only *federal* non-penalty civil compliance actions brought by EPA, as noted above, California Water Code § 13301 authorizes regional water boards to bring non-penalty civil compliance actions pursuant to which a revised compliance time-tables may be established. *See supra* note 5.

still be enforced against the polluter through citizen suits, then what good are compliance actions and what meaning do their extended timetables have? The answer to this question is that such orders constitute agreements by the issuing enforcement authority on how the authority—be it EPA or a state agency—plans to exercise its prosecutorial discretion. Given that such authorities are vested with enforcement powers broader in some respects than those conferred on private citizens under the citizen suit provision, and that in the vast majority of cases there exists no serious threat of citizen suit enforcement, assurances regarding authorities' intended exercise of their enforcement discretion carry great real-world significance. *See Shell*, 840 F.Supp. at 716-17 (construing language in NPDES permit as an assurance as to how the Regional Board intended to exercise its prosecutorial discretion, and not as a term modifying and weakening the permit's effluent limit). Thus, even if they cannot shield polluters from citizen suits brought to enforce the terms of NPDES permits, such actions still serve a meaningful role in the Clean Water Act enforcement scheme.

With this tension resolved, the Court concludes that, when viewed as a whole, the structure of the Clean Water Act clearly evidences a legislative intent on the part of its drafters that disfavors the interpretation urged by Unocal regarding the effect of deadline extensions contained in administrative compliance orders. As explained above, the statute imposes a variety of stringent conditions before administrative actions can modify the terms of NPDES permits. Moreover, as discussed in the next section, the statute also expressly provides that citizen suits are barred only in circumstances where certain specified types of agency enforcement actions have been taken by state or federal enforcement agencies. Unocal, in effect, contends that administrative extensions of permit deadlines can bar citizen suits to enforce permits even where the extensions neither (1) qualify as "modifications," nor (2) satisfy the requirements of

the provision that expressly bars citizen suits in some circumstances. Recognition of such an unenumerated category of administrative extension would render superfluous the very specific requirements established by Congress for permit modifications and preclusion of citizen suits. The canon of statutory construction strongly disfavors such interpretations that do not accord meaning to every word and provision in a statute, or to statutory distinctions drawn by Congress. *See United States* v. *Nordic Village, Inc.*, ---- U.S. ----, ----, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992) ("[It is a] settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect."); *In the Matter of Greystone III Joint Venture*, 948 F.2d 134, 138-39 (5th Cir. 1991) (interpretation of one statutory provision so as to render another provision superfluous "is anathema to elementary principles of statutory construction"). By writing these provisions out of the statute, Unocal's construction would create an enormous loophole, elevating civil compliance orders to the status of *de facto* modifications, thereby allowing dischargers to achieve, in effect, modifications that would otherwise be illegal under the Act. The existence of these specific provisions in the statute creates a strong inference that Congress did not intend to authorize unenumerated exceptions of the sort urged by Unocal.[10]

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[10] Additional support for this conclusion can be inferred from *Washington Public Interest Research Group* v. *Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993). In *Pendleton*, the EPA issued an administrative compliance order to a polluter that had violated the discharge limits specified in its NPDES permit. The EPA order set an extended compliance schedule, and ordered the polluter to make certain identified physical improvements deemed to be necessary to bring about compliance, and threatened sanctions if the polluter did not comply with the terms of the compliance order. Subsequently, an environmental group

(continued...)

In light of the above, the Court holds that, as a matter of law, an administrative enforcement action by a state agency charged with enforcing the Clean Water Act that purports to extend a deadline specified in an NPDES permit for complying with the permit's discharge limits does not serve to suspend the permit's deadlines such that they may not be enforced through a citizen suit. Such an extension, unless it satisfies the requirements to qualify as a "modification," is simply a statement by the agency as to how it plans to

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[10] (...continued)
filed a citizen suit seeking, *inter alia*, an injunction requiring immediate compliance with the discharge limits specified in the permit. The Ninth Circuit held that because the type of enforcement action that EPA had taken was not an administrative penalty action under 33 U.S.C. § 1319(g) but rather an administrative compliance action under 33 U.S.C. § 1319(a), a citizen suit could still be maintained to enforce the limits and deadlines contained in the original permit. (As noted above and discussed below, penalty actions can trigger the 33 U.S.C. § 1319(g)(6)(A) preclusive bar against citizen suits.)

The *Pendleton* defendant apparently did not expressly raise the argument made by Unocal that the administrative order extending the compliance deadline suspended the effect of the permit deadline such that it was not enforceable through a citizen suit. However, in reversing, the Ninth Circuit implicitly rejected this argument, for the argument would have afforded an alternative basis for affirming the district court's dismissal, and the court of appeals will normally affirm so long as there exists any alternative ground, fairly supported in the record, that would justify the district court's ruling. *Golden Nugget, Inc.* v. *American Stock Exch., Inc.*, 828 F.2d 586, 590 (9th Cir. 1987) (affirmance on alternative ground appropriate where the record adequately establishes material facts and issues are purely legal). Thus, the *Pendleton* holding supports an inference that the Ninth Circuit was not persuaded by Unocal's argument.

exercise its prosecutorial discretion. Unocal's motion to dismiss plaintiffs' first cause of action on this ground is therefore DENIED.

**2. WHETHER A CITIZEN SUIT IS PRECLUDED UNDER THE 33 U.S.C. § 1319(g)(6)(A)(iii) BAR**

As noted above, the Clean Water Act expressly provides that citizen suits are barred in circumstances where certain categories of agency enforcement action have either been concluded or are pending with respect to an alleged violation. Unocal contends that the CDO issued by the Regional Board qualifies as an enforcement action that suffices to trigger a preclusive bar against the instant citizen suit, thereby requiring its dismissal.

33 U.S.C. § 1319(g)(6)(A) provides:

> [A]ny violation—
>
> > (i) with respect to which the Administrator [of the EPA] or the Secretary [of the Army] has commenced and is diligently prosecuting an action under [33 U.S.C. § 1319(g), which allows EPA to assess civil penalties],
> >
> > (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to [33 U.S.C. § 1319(g)], or
> >
> > (iii) *for which* the Administrator, the Secretary, *or the State has issued a **final** order not subject to further judicial review and the violator has paid a **penalty** assessed under [33 U.S.C. § 1319(g) ], or such **comparable** State law*, as the case may be,
>
> shall not be subject to a civil penalty action under [33 U.S.C. § 1319(d)] or [33 U.S.C. § 1321(b)] or [a citizen suit under 33 U.S.C. § 1365].

(Emphasis added). Unocal contends that the CDO and the settlement agreement constitute "a final order" under a state

law "comparable" to 33 U.S.C. § 1319(g) for which the violator has paid an assessed "penalty," thereby triggering the citizen suit bar under 33 U.S.C. § 1319(g)(6)(A)(iii). In order for dismissal on this ground to be appropriate, all of these conditions must be met.

**a. "Final Order"**

Plaintiffs argue that the CDO and settlement agreement do not constitute a "final order not subject to further judicial review." Under the settlement agreement, Unocal and the other refineries expressly retained the right to challenge in court in 1998 the final selenium limits specified in their NPDES permits when, under the CDO, they are finally obligated to comply with those limits.[11] In light of this provision, there indeed appears to be a substantial issue as to whether the CDO is a "final order" within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii). However, because this issue was not well briefed by the parties and since there exist other bases for denying dismissal on preclusion grounds, the Court declines to reach this question.

**b. "Comparable State Law"**

The 33 U.S.C. § 1319(g)(6)(A)(iii) preclusive bar applies only where "the violator has paid a penalty assessed under [33 U.S.C. § 1319(g)], or such comparable State law." In evaluating whether this provision is satisfied in this case, the Court must determine, first, what state law the putative

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[11] The settlement agreement provides that the refineries agree not to challenge the final selenium limits in court in 1998 if they are able to win an additional extension of the compliance schedule pursuant to ¶ 5 of the CDO. However, that concession is no concession at all, for if the refineries succeed in obtaining such an additional extension of the compliance deadline, then, of course, there will be no reason for them to challenge the limits.

penalty was assessed under and, second, whether that law is "comparable" to 33 U.S.C. § 1319(g).

### i. The Regional Board's Action Was Taken under California Water Code § 13301

California law vests regional water boards with a variety of different prosecutorial tools for enforcing compliance with effluent limits or standards imposed under NPDES permits. These include issuance of cease and desist orders under California Water Code § 13301, issuance of cleanup or abatement orders under California Water Code § 13304, imposition of administrative civil penalties under California Water Code § 13385, and referral to the California Attorney General for civil prosecution.

It appears quite clear that in issuing the CDO, the Regional Board was exercising its authority under California Water Code § 13301, which empowers regional boards to issue cease and desist orders pursuant to which such boards may establish extended time-tables for compliance with Board-imposed effluent limits. Cal. Water Code § 13301(b). The CDO itself expressly states that it was issued "pursuant to Section 13301 of the California Water Code." CDO at 7. Moreover, the CDO offers the following explanation of the decisionmaking process that resulted in the settlement and issuance of the CDO:

> The Regional Board has considered the various enforcement and penalty options available to it regarding violation of [the NPDES permit], including the issuance of a cease and desist order or a cleanup or abatement order, imposition of an administrative civil penalty and referral to the Attorney General for civil prosecution. Under the circumstances detailed in the Findings set forth above, the Regional Board has determined that the most appropriate course of action is settlement of the litigation and issuance of a cease and desist order.

CDO at 6.

Unocal appears to argue that since Unocal, Exxon, and Shell agreed to make a $2 million payment to the state as part of the settlement of which the CDO was a component, the Regional Board's enforcement action must be construed as a civil penalty action under California Water Code § 13385. Unocal speculates that if it, Exxon, and Shell had refused to agree to the payment, the Regional Board would then have instituted a civil penalty action under § 13385. However, as noted above, the CDO expressly categorized the actions taken as (1) entry of a cease-and-desist order under § 13301, and (2) settlement of the refineries' state court lawsuit. The fact that the Board identified its actions as such after first noting the different enforcement options available to it—including the option of imposing of a civil penalty under § 13385—makes clear that the Board expressly declined to invoke its § 13385 authority in issuing the CDO and entering the settlement agreement. The only mention of the $2 million payment in the CDO is found in the "findings" section, where the payments are described only as a "term" of the settlement of the state court lawsuit, CDO at 6; no mention of the payment appears in the "order" section of the CDO, and the document does not purport to order payment of the sum.

This labeling clearly was not accidental. The CDO and settlement agreement resulted from lengthy and detailed negotiations among the parties. The Court sees no reason to disregard the Regional Board and the parties' deliberate decision to label the Board action a cease-and-desist order, and the accompanying document a settlement agreement. If the Board and the parties had intended for the Board order and settlement agreement to be deemed a settlement of a threatened but unfiled civil penalty action, they could easily have so indicated. The Court must conclude from their failure to do so that they did not so intend. Since the Regional Board is vested with authority to choose which of its enforcement options to exercise, the Board's categorization of its action as a cease-and-desist action under § 13301 is

dispositive of the question of what type of enforcement action the Board attempted to take.

In light of the above, the Court concludes that, as a matter of law, the CDO was issued in an exercise of the Board's administrative enforcement authority under California Water Code § 13301 to issue cease and desist orders establishing time-tables for compliance with Board-imposed effluent limits. The Court further concludes that, as a matter of law, the settlement agreement was just that—a settlement of the refineries' state court lawsuit. The Court rules that, as a matter of law, neither instrument constituted an exercise of the Board's authority under California Water Code § 13385 to impose civil penalties.

**ii. The "Comparability" Assessment Is Conducted By Examining the Particular State Statutory Enforcement Provision Involved, Not the State Statutory Enforcement Scheme as a Whole**

The thrust of Unocal's argument as to why the "comparability" requirement is satisfied in this case focuses not on the particular statutory power that the Board was exercising in issuing the CDO and entering the settlement, but rather on the California law enforcement scheme as a whole. Unocal argues that even if the CDO was issued pursuant to California Water Code § 13301 and even if, as the Court concludes below, that enforcement provision is not comparable to 33 U.S.C. § 1319(g), the comparability requirement is still satisfied because the comparability assessment must be conducted by examining the state statutory enforcement scheme as a whole, not simply the particular state statutory enforcement provision under which the action in question was taken. Unocal argues that the California scheme, when all of its various enforcement provisions are considered, is comparable to 33 U.S.C. § 1319(g), thereby satisfying the requirement.

The issue here is whether the language "comparable state law" should be interpreted to mean "comparable state enforcement scheme" or "comparable state enforcement provision." While quite technical, this interpretive question is an important one which has not yet been resolved by the courts. Research has revealed only a single reported decision discussing this question at any length. That case, *North & South Rivers Watershed Ass'n* v. *Scituate*, 949 F.2d 552 (1st Cir. 1991), did not construe the comparability requirement as it applies under 33 U.S.C. § 1319(g)(6)(A)(iii); rather it interpreted it under a neighboring provision, 33 U.S.C. § 1319(g)(6)(A)(ii), which reads:

> [A]ny violation—
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> * * * * * *
>
> *(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law* ***comparable*** *to [33 U.S.C. § 1319(g)]*
>
> shall not be subject to a civil penalty action under [33 U.S.C. § 1319(d)] or [33 U.S.C. § 1321(b)] or [a citizen suit under 33 U.S.C. § 1365].

(Emphasis added). However, because the language in the two provisions is parallel and the canon of statutory construction presumes that when Congress uses a term in more than one location in a statute, it is meant to have the same meaning, *see United States* v. *Thompson/Center Arms Co.*, --- U.S. ----, ---- n.5, 112 S.Ct. 2102, 2107 n. 5, 119 L.Ed.2d 308 (1992) (plurality opinion); *Mississippi Poultry Ass'n, Inc.* v. *Madigan*, 992 F.2d 1359, 1363 (5th Cir. 1993), *Scituate* is relevant to the instant question before this Court.

In *Scituate*, the state was prosecuting an enforcement action under a provision of state law that would not result in imposition of civil penalties against the Clean Water Act violator. Arguing that the comparability assessment required the court to compare the particular state enforcement

provision used by the state with 33 U.S.C. § 1319(g), the citizen suit plaintiff contended that the preclusive bar was not triggered since the state was proceeding under a provision that, unlike 33 U.S.C. § 1319(g), did not authorize imposition of civil penalties. However, the *Scituate* court concluded that, for policy reasons, the comparability requirement should be applied to the state enforcement scheme as a whole, not the particular enforcement provision at issue. The court reasoned that provision-by-provision analysis would mean that some state enforcement actions would not trigger the bar against citizen suits, and would thereby allow duplicative enforcement proceedings. The *Scituate* court concluded that Congress meant for citizen suits to be available only where the state is not addressing the problem at all, and not simply wherever a state decides not to seek civil penalties. *Scituate*, 949 F.2d at 555-56.

This Court is not persuaded by the reasoning of the *Scituate* court. For several reasons, the Court concludes that the comparability assessment must be made by looking to the particular state enforcement provision at issue, not the state scheme as a whole. First, the structure of § 1319(g) supports an inference favoring this conclusion. The Clean Water Act empowers EPA to respond to violations using any of a variety of enforcement options. However, the statute specifies that only where one specific type of EPA enforcement action — a penalty action under 33 U.S.C. § 1319(g) — has been taken are citizen suits precluded under 33 U.S.C. § 1319(g)(6)(A)(iii). *Pendleton*, 11 F.3d at 885-86. Since whether an EPA enforcement action triggers the preclusive bar depends on the particular enforcement provision under which EPA proceeded, it would logically follow that the same would hold for state laws: that only where a state has proceeded (and assessed a penalty) under a state enforcement provision comparable to 33 U.S.C. § 1319(g) is the preclusive bar triggered. It would be odd indeed to construe the statute as requiring courts to conduct a comparison

between the federal 33 U.S.C. § 1319(g) enforcement provision on the one hand, and the whole of the state enforcement scheme on the other. Clearly, it is more natural to read 33 U.S.C. § 1319(g)(6)(A)(iii) as requiring a comparison between the specific state enforcement provision actually used and the specified federal enforcement provision, 33 U.S.C. § 1319(g).

The interpretation urged by Unocal would introduce an anomalous dichotomy into the statute, for state enforcement actions would then enjoy much broader preclusive effects against citizen suits than EPA actions. Any type of state enforcement action would trigger the preclusive bar so long as *somewhere* in the state's enforcement scheme there existed provisions comparable to 33 U.S.C. § 1319(g). Penalties imposed under enforcement provisions not affording procedural safeguards comparable to 33 U.S.C. § 1319(g) would bar citizen suits. Thus, nominal "penalties" imposed under state provisions lacking penalty assessment factors comparable to those enumerated in 33 U.S.C. § 1319(g)(3), and without a right to public notice or opportunity for participation comparable to those provided under 33 U.S.C. § 1319(g)(4), would insulate polluters from citizen actions so long as the state had at its disposal — although had declined to use — other enforcement provisions that are comparable to 33 U.S.C. § 1319(g).

Although the federal enforcement scheme, of course, contains all of these features, federal enforcement actions trigger the preclusive bar only where they are taken under one particular enforcement provision: 33 U.S.C. § 1319(g). Surely the preclusive effect of state enforcement actions can be no broader.

Construing the statute to require enforcement provision comparability would not, as the *Scituate* court contended, be inconsistent with sensible policy or with the goals of the Clean Water Act. The Court can easily imagine that Congress, realizing that state enforcement agencies can be

susceptible to regulatory "capture" by the industries they regulate, might have feared that state agencies might consent to inappropriately lax compliance agreements. Congress might therefore sensibly have decided that the safeguard enforcement device of the citizen suit should be precluded only where a state has taken an enforcement action that approximates the rigor of a federal 33 U.S.C. § 1319(g) enforcement action.

The Court's conclusion as to application of the comparability requirement is also in accord with EPA's own administrative interpretation of the statute. *See* EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987); EPA Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act (1993). This interpretation of a provision of the Clean Water Act by the federal agency charged with its enforcement constitutes persuasive authority and further buttresses the Court's conclusion today.[12]

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[12] Where a legislative intent regarding a particular statutory issue is not evident from a statute's text or legislative history, courts will defer to the interpretation of the law favored by the agency charged with its enforcement, so long as the agency interpretation is not otherwise inconsistent with the plain language of the statute or with other of its provisions. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). However, this doctrine does not apply in this case, for the Court infers from the statute's text and structure a legislative intent regarding the question at issue. Nonetheless, the agency's interpretation constitutes persuasive authority supporting the Court's conclusion.

EPA has argued in other cases that in order for a state law to be comparable to 33 U.S.C. § 1319(g), it must have been certified as such by EPA pursuant to 33 U.S.C. § 1342(b). *See*

(continued...)

### iii. California Water Code § 13301 Is Not "Comparable" to 33 U.S.C. § 1319(g)

Having concluded that the Court must compare California Water Code § 13301, the state enforcement provision under which the CDO was issued, with 33 U.S.C. § 1319(g) in order to determine whether the 33 U.S.C. § 1319(g)(6)(A)(iii) bar is triggered, the Court has little difficulty deciding that the two provisions are not "comparable."

In conducting such a comparability assessment, other courts have drawn guidance from remarks made on the floor of the Senate by Senator John Chaffee, the principal author and sponsor of the 1987 Clean Water Act Amendments. *See Atlantic States Legal Foundation* v. *Universal Tool and Stamping Co.*, 735 F.Supp. 1404, 1415 (N.D. Ind. 1990) (quoting remarks by Sen. Chaffee). In those remarks, Senator Chaffee stated:

> [T]he limitation of [33 U.S.C. § 1319(g)] applies only where a State is proceeding under a State law that is comparable to [33 U.S.C. § 1319(g)]. For example, in order to be comparable, a State law *must* provide for a right to a hearing and for public notice and participation procedures similar to those set forth in [33 U.S.C. § 1319(g)]; it *must* include analogous penalty assessment factors and judicial review standards and it *must* include provisions that are analogous to the other elements of [33 U.S.C. § 1319(g)].

133 Cong. Rec. S737 (daily ed., Jan. 14, 1987) (emphasis added), *quoted in Universal Tool*, 735 F.Supp. at 1415. EPA has also issued its own administrative interpretation of the

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[12] (...continued)
*Scituate*, 949 F.2d at 556 n.8. However, as this argument has not been raised by the parties on this motion, the Court shall not address it at this time.

comparability requirements. According to EPA, a state enforcement provision, in order to be comparable, must include the features listed by Senator Chaffee: a right to a hearing analogous to that provided under 33 U.S.C. § 1319(g)(2); public notice and participation requirements analogous to those of 33 U.S.C. § 1319(g)(4); a right to judicial review analogous to that provided under 33 U.S.C. § 1319(g)(8); and penalty assessment factors analogous to those enumerated in 33 U.S.C. § 1319(g)(3). EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987), at 4-6. EPA interprets the analogous penalty assessment factor requirement as meaning not only that the maximum potential penalty liability must be at least equivalent to the federal limits, and that the factors to be considered in arriving at the appropriate penalty must be adequate and appropriate, but also that the *actual penalty* collected or assessed must be adequate and appropriate. *Id.* at 5. Support for this interpretation is found in a congressional Conference Report interpreting the comparability requirement under a 1986 version of the Clean Water Act Amendments which contained a provision identical to 33 U.S.C. § 1319(g)(6)(A). (The 1986 bill was not enacted into law, but the following year the 1987 Clean Water Act Amendments were passed, containing the identical provision now codified at 33 U.S.C. § 1319(g)(6)(A).) *See* House-Senate Conference Report on Clean Water Act Amendments, H. Rep. 99-1004, 99th Cong., 2d Sess., *reprinted in* 132 Cong. Rec. 31577, 31616 (1986).[13] EPA

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[13] When a State has proceeded with an enforcement action relating to a violation with respect to which the Administrator [of EPA] or the Secretary [of the Army] is authorized to assess a penalty under this provision the Administrator and the Secretary are not authorized to take any action under [33 U.S.C. § 1319(g)] if the State demonstrates that the state-imposed

(continued...)

also advises that the state law must provide penalty collection authority and streamlined judicial collection procedures analogous to those of 33 U.S.C. § 1319(g)(9). EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987), at 6.

In light of the above legislative history and administrative interpretation by the agency charged with enforcing the statute at issue, the Court holds that the features enumerated in Senator Chaffee's remarks, in the EPA policy guidance, and in the Conference Report, are among those that a state enforcement provision must offer in order to be comparable to 33 U.S.C. § 1319(g). *See Universal Tool*, 735 F.Supp. at 1415.

Examining California Water Code § 13301, the Court notes, even before getting to the above factors, that the California law provision does not authorize imposition of civil penalties. The availability of such a remedy is, of course, a necessary prerequisite for "comparability," as is evident from the fact that 33 U.S.C. § 1319(g)(6)(A)(iii) requires not just that civil penalties be available, but that they actually be imposed before the preclusive bar can be triggered. Second, since the California law provision does not authorize penalties, it of course lacks penalty assessment factors comparable to those enumerated in 33 U.S.C. § 1319(g)(3). The presence of such factors is a requirement for comparability. *Universal Tool*, 735 F.Supp. at 1415.

In light of the Court's rulings on the above factors, it is unnecessary for the Court to proceed further and determine whether the California provision satisfies the other

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[13] (...continued)
penalty is appropriate.

House-Senate Conference Report on Clean Water Act Amendments, H. Rep. 99-1004, 99th Cong., 2d Sess., *reprinted in* 132 Cong. Rec. 31577, 31616 (1986).

comparability requirements. The Court rules that, as a matter of law, California Water Code § 13301 is not "comparable" to 33 U.S.C. § 1319(g) within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii).[14]

**c. "Penalty"**

The 33 U.S.C. § 1319(g)(6)(A)(iii) preclusive bar applies only where "the violator has paid a *penalty* assessed under [33 U.S.C. § 1319(g)], or such comparable State law" (emphasis added). As noted above, Unocal contends that the $2 million payment that it, Exxon, and Shell agreed to make constitutes a "penalty" within the meaning of the statute.

As used in the Clean Water Act, the word "penalty" is a term of art referring to a payment that a polluter is assessed to pay by an enforcement agency. By its nature, a payment can be a penalty only where the statutory grant of authority exercised by the agency is one that empowers the agency to assess penalties. As explained above, the Court has concluded that in issuing the CDO, the Regional Board *was* exercising its authority under California Water Code § 13301 to issue cease and desist orders, and expressly *was not* exercising its authority under California Water Code § 13385 to impose civil penalties. The Court has also concluded that in entering the settlement agreement, the Board was simply settling the refineries' state court lawsuit and was not

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[14] This conclusion is reinforced by *Pendleton*, 11 F.3d 883, for it appears that a cease-and-desist action under California Water Code § 13301 is the equivalent of a federal administrative compliance action under 33 U.S.C. § 1319(a). Since the Ninth Circuit ruled in *Pendleton* that 33 U.S.C. § 1319(a) EPA compliance actions do not trigger the 33 U.S.C. § 1319(g)(6)(A)(iii) preclusive bar, the Court's ruling today that actions taken under a state law counterpart to 33 U.S.C. § 1319(a) are not barred either gives the statutory scheme a logical parallelism.

purporting to exercise its enforcement authority under either of the above provisions. As California Water Code § 13301 does not empower the Board to assess civil penalties in enforcement actions taken pursuant to it, the Court concludes that the $2 million payment agreed to by Unocal, Exxon, and Shell pursuant to the settlement agreement was not, as a matter of law, a penalty within the meaning of 33 U.S.C. § 1319(g)(6)(A)(iii).

This conclusion is reinforced by the fact that the Board specifically avoided characterizing the payment as a penalty. First, both the CDO and the settlement agreement refer to the payment using only the verb "pay"; both studiously avoid any mention of a "penalty." CDO at 6; Settlement Agreement ¶ 3. Second, at a public hearing on the settlement agreement, the Board's Counsel carefully and deliberately avoided characterizing the settlement monies as a penalty:

> I could perhaps comment further on that question of penalty that Mr. Lozeau [representative of plaintiff San Francisco BayKeeper] raised. I think its true that there is no administrative civil liability action or [section] 13385 of the Water Code action in this case, which is the usual method that the Board takes to assess penalties.
>
> And I think if you look at the expressed language of the settlement, it says, "As part of the settlement, the companies shall collectively pay the Regional Board the sum of two million." The settlement document does not characterize this as a penalty. It characterizes it as a payment. And, therefore, I don't see a need to make any interpretation as to whether this is a penalty or not.

Reporter's Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 37. Indeed, at the same hearing Ms. Margaret Rosegay, counsel for Unocal and for the refineries in the state court action, went even further, stating:

> It has always been the refineries' position that they have done nothing wrong and as a consequence *it is*

> *inappropriate to characterize the payments which are being made to the Board as a penalty*. Nevertheless, the fact remains that it is money which is being paid.... [I]t is being paid as a means of settling the lawsuit. And I think, for all practical purposes, it is, in fact, a penalty.

*Id.* at 38 (emphasis added). Although conceding that the payment might, practically speaking, function as a penalty, Ms. Rosegay continued to maintain that, legally speaking, it was not one.[15]

It appears quite clear that Unocal, Exxon, and Shell insisted as a condition of the settlement that the payment not be characterized as a "penalty" in order that the settlement not be construed as an admission of wrong-doing. This choice presumably explains as well why the Board and the refineries went out of their way to describe the enforcement action as a California Water Code § 13301 cease and desist action, rather than a California Water Code § 13385 civil penalty action. Indeed, later during the same public hearing a member of the Board admitted as much in the face of questioning by a representative of plaintiff Citizens for a Better Environment-California ("CBE"):

> *[T]he fact that it's not called penalties was part of negotiations*. It is penalties, that's plain and simple what it is.

Reporter's Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 28 (emphasis added). Although this statement amounts to a frank admission that the payment functions like a penalty, the Board Member speaking

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[15] Strictly speaking, only the intent of the Regional Board is relevant, since only the Board is empowered to impose penalties. However, the intent and understanding of the refineries is also probative of the Board's intent, since issuance of the CDO and entry the settlement were pursuant to an agreement among those parties.

expressly kept to the position that there was an agreement not to classify the payment as one.[16]

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[16] Unocal cites comments made at the same public hearing by a representative of plaintiff CBE in which the speaker took issue, not with the Board's refusal to term the payment a "penalty," but rather with the amount of the payment, contending that it was too small. *See* Reporter's Transcript of Proceedings Before Regional Board, Dec. 15, 1993, at 25-28 (comments of Mr. Greg Karras). However, any such comments made by a private citizen who was not a party to the settlement is of no relevance for determining whether the Board, or the other parties to the settlement, intended for the payment to be deemed a "penalty."

Unocal also cites the fact that in a letter commenting on the proposed settlement and CDO, EPA's regional office referred to the $2 million payment as a "penalty." *See* Letter to M. Anne Jennings, from Harry Seraydarian, Director, Water Management Div., EPA Region IX Office, Dec. 13, 1993, at 2. After oral argument, plaintiffs submitted to the court a letter from EPA's regional office in which EPA expressly disavowed that the use of the term "penalty" in the December 13 letter was intended to imply an opinion on the part of EPA on the above legal question. *See* Letter to Steven Ritchie, et al., from Harry Seraydarian, Director, Water Management Div., EPA Region IX Office, date-stamped June 9, 1994. EPA stated that if it had considered the legal question, it would have had to adhere to EPA's position on the application and interpretation of 33 U.S.C. § 1319(g)(6)(A)(iii) set forth in the agency's administrative guidelines. *See* EPA Guidance on State Action Preempting Civil Penalty Actions Under the Federal Clean Water Act (1987); EPA Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act (1993) *cited supra*. However, Unocal argues that the Court may not rely on the clarification contained in the June 9 letter, contending that, for several reasons, judicial notice may not properly be taken of the

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